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THE CAESARS AND THE STARS

The Crime and Punishment of Forbidden Astrological Consultations in Imperial Rome

I. *The Augustan Edict of 11 A.D.**

THE triumphant rise of the belief in astrology in the Latin world reached its zenith in the early principate. Scholars and generals, poets and emperors, society ladies and girls who trod the primrose path now swelled the ranks of the faithful. The Roman government, prior to the establishment of the principate in 27 B.C., had shown occasional objections to the practice of astrology, for example in 139 and 33 B.C.[1] But official opposition in each instance had been confined to a regional ban applying to the capital, and in 139 also to Italy. Beyond the Italian peninsula, Roman law took no cognizance of astrology until the reign of Augustus. The apathy of the preceding republican era was chiefly due to two reasons: (1) The well established constitutional ladder of honors and offices provided sufficient outlets for the politically ambitious. Astrological promises of future greatness therefore could be fulfilled through constitutional channels and did not incite the desire for political coups. (2) The apparent stability of the social and religious structure of the old republic seemed to render harmless the inflammatory potential of as-

* This study is part of a series entitled *Astrology in Roman Law and Politics*, made possible by the generous support of the Social Science Research Council and the American Philosophical Society.

[1] Valerius Maximus, I, 3, 3; Cassius Dio, *ep.* LVI, 25, 5-6.

trological predictions among the masses of Rome and Italy, at least prior to the age of the Gracchi.

The great revolution of the first century B.C., which culminated in the overthrow of the republic and the establishment of the principate, put an end to official complacency. Sulla and Pompey, both willing listeners of astrologers,[2] had refused to grasp monarchic power when it was within reach. Julius Caesar at last administered the death-blow to the moribund republic. His overt introduction of absolute monarchy, however, shocked even those who realized the need of radical changes. The Ides of March, 44 B.C., were the result, but the assassination of the dictator did not resuscitate the old order. With Octavianus' victory over Mark Antony in 30 B.C. the monarchic era began. The new ruler was careful to camouflage his power behind the façade of a constitution. Adopted in 27 B.C. it inaugurated the period called the principate. Nevertheless Octavianus, who recently had been voted the title *Augustus* by the senate, fully realized the precariousness of his position. Having himself received the encouragement of astrological predictions of a brilliant future,[3] he was aware of their heady taste. Of the great families of republican Rome a number considered the Julian *gens* as an upstart and themselves entertained hopes of claiming the throne. Energetic noblemen therefore might easily be persuaded by astrological advisers that a coup which they would plan were "destined" to succeed.

Not only astrology, but other forms of divination also could exercise such an inflammatory influence, especially the ubiquitous oracular literature. After the short-lived ban of diviners from Rome (33 B.C.), however, more than twenty years elapsed before official action was taken again in this field. On March 6, 12 B.C., Augustus claimed the last of the great offices of state which hitherto he had refrained from assuming: He

[2] Plutarch, *Sulla*, 5, 5-6; 37, 1; Cicero, *de divinatione*, II, 47, 99.

[3] Suetonius, *Augustus*, 94, 12.

became *pontifex maximus*.[4] At once he ordered the confiscation of all oracular literature. More than two thousand books and scrolls of this kind were gathered in. With the sole exception of the Sibylline books they were condemned to the flames in a solemn autodafé.[5]

No ban, however, seems to have been proclaimed at the time on the publication of oracular, astrological, or any other divinatory writings. This was in keeping with the relatively liberal attitude of Augustus (grudgingly even admitted by Tacitus [6]) concerning freedom of literary expression. Not until the last decade of his long reign did the aging ruler begin to reconsider his policy. The immediate cause of this change appears to have been the famine period beginning in 5 A.D.[7] The first official step in the new direction was the reinterpretation of the ancient *lex maiestatis* (which in earlier times had only been applied to those who had harmed the state by acts, not merely by words).[8] This legal policy went into effect sometime between 7 and 11 A.D., probably around the year 8.[9] For the new crime of "literary treason" a new penalty was provided: the burning of the culprit's subversive writings.[10] In more serious cases of this kind Augustus sanctioned the ad-

[4] *Corpus inscriptionum latinarum* (*CIL*), I (2nd ed.), p. 371 = IX, p. 503, no. 5189, 1; compare *Monumentum Ancyranum*, II, 10; Appian, *bell. civ.*, V, 13, 131.

[5] Suetonius, *Augustus*, 31, 1; Cassius Dio, LIV, 27, 2-3. For an earlier attempt of Augustus to establish a secret official version of the Sibylline books, see Cassius Dio, LIV, 15, 8; compare also Tacitus, *Annals*, VI, 18 (12).

[6] *Annals*, IV, 34.

[7] Suetonius, *Augustus*, 42, 3 (compare, 19, 3); Cassius Dio, LV, 26, 1-5; 27, 1-3; Jerome, *Chronica*, *ol.* 196 (6 A.D.).

[8] Tacitus, *Annals*, I, 72; but see Suetonius, *Tiberius*, 2, 3.

[9] Compare F. H. Cramer, "Bookburning and Censorship in Ancient Rome," *Journal of the History of Ideas*, VI (1945), 168ff.

[10] The novelty of this procedure is conclusively established by the comment of Seneca rhetor (*Controversiae*, X, pr. 5) in connection with the trial of Labienus.

ditional imposition of the penalty of exile.[11] Not until the reign of Tiberius was the death penalty imposed upon "literary traitors."[12]

It was perhaps inevitable that the new Augustan policy led to the curtailment of the hitherto unlimited freedom of astrological practice. The older the emperor became the more eagerly did his opponents seek information about the prospective date of his demise. Republicans might hope for a restoration of the old order, ambitious individuals, however, would seek the throne for themselves when the long reign seemed to come to a close. No other form of divination inspired, in upper-class Romans at least, the same confidence as astrology, whose "logically infallible" revelations were widely accepted. Even when these were disproven by subsequent events, only the human frailty of the astrologers, but not the fallacy of their tenets was blamed,[13] a viewpoint fully shared by Augustus. The fanatical devotion to astrology of Tiberius, heir designate, and the influence of Tiberius' friend Thrasyllus, whom he had introduced into the inner Augustan circle, may

[11] The trial of Cassius Severus seems the only one of this kind during the Augustan era which led to a sentence of exile.

[12] In *Criminal Trials and Criminal Legislation under Tiberius* (American Philological Association, 1935), R. S. Rogers listed more than a hundred known *maiestas* trials. W. Allen, "The Political Atmosphere of the Reign of Tiberius," *Transactions of the American Philological Association,* LXII (1941), 18, reduced this score to sixty-three, while Ciaceri, in *Studi Storici per l'antichità classica,* III (1910), 18ff. admits ninety-five *maiestas* cases for Tiberius' reign.

The first execution for the crime of literary treason alone seems to have been that of Clutorius Priscus (Tacitus, *Annals,* III, 49-51; Cassius Dio, LVII, 20, 3). E. Ciaceri's suggestion ("La responsibilità di Tiberio nell'applicazione della lex maiestatis" in *Studi Storici per l'antichità classica,* II [1909], 160f.) that the senate's belief in the magic quality of Clutorius' poetry evoked the death sentence seems unlikely. The senate, however, not Tiberius himself, thus inaugurated the new punishment in 21; see Rogers, *op. cit.,* pp. 62-64, and his *Studies in the Reign of Tiberius,* p. 149. In 23 the case of Aelius Saturninus ended with the execution of the defendant, this time obviously with imperial sanction.

[13] For a classical restatement of this attitude, see for example Ptolemy, *Tetrabiblos,* I, 6.

have contributed to the old emperor's decision to place certain restrictions on the manner and scope of astrological practice. No longer would curbs be confined to short-time regional expulsion measures, but a durable, empire-wide legal regulation was to circumscribe astrological activities everywhere. This was done by means of an imperial edict, proclaimed it seems during the quaestorship of Tiberius' son Drusus in 11 A.D.[14]

The text of this edict has not been rediscovered as yet. The gist of it, however, was preserved by Cassius Dio:

> " It was forbidden to the seers (*μάντεσιν*) to prophesy to any person alone or to prophesy regarding death even if others should be present." [15]

That astrologers were classified as " seers "—and were perhaps even the chief target of the edict—was shown by Dio's (or rather Xiphilinus') words immediately following the above lines:

> " Yet so far was Augustus from caring about such matters in his own case that he set forth to all in an edict the aspect of the stars at the time of his own birth. Nevertheless he forbade this practice." [15]

This somewhat vague, and probably mutilated passage indicates:

(1) Augustus in an edict revealed his own horoscope and with it the date of his future demise (according to astrological calculations).
(2) He forbade from then on astrological predictions of anyone's life-span.
(3) Consultations *à deux* were prohibited.

The reasoning behind these regulations was not difficult to find. Obviously rumors of the emperor's approaching end were circulating freely. The published horoscope, however, would " prove " that this event was not likely to occur in the

[14] *CIL*, XII, no. 147, p. 25; Cassius Dio, *ep.* LVI, 25, 4.

[15] Cassius Dio, *ep.* LVI, 25, 5.

near future, and therefore calm excited spirits. The danger of telling slaves, prospective heirs, dissatisfied wives or husbands, or personal enemies the date at which they could expect the death of masters, spouses, or enemies was clearly that, convinced of the "inevitability" and the nearness of such a happy event, they might take matters into their own hands, if nature refused to abide by the stars. Finally the presence of witnesses would, one might hope, restrain clients from asking unlawful questions and prevent astrologers and other diviners from answering them.

Of these two restrictions, binding upon all other diviners, as well as upon astrologers, the consultations *à deux* proved the most difficult to suppress. Nevertheless this technical restriction seems to have been kept "on the statute books" until the fourth century A.D. Until then (when all divinatory practice was outlawed) the topical restriction of the Augustan edict was also enforced with varying degrees of intensity, depending upon who consulted astrologers (or other "seers") and on whose death information was sought. Inquiries about the death of a slave's master or that of an emperor continued to be punished with great severity for more than three hundred years after the reign of Augustus.[16] In general the political motivation always outweighed the social one in the enforcement of the Augustan edict of 11 A.D. The smoldering fires of rebellion or fear of an outright coup had certainly been largely responsible for its very proclamation. The new edict from the beginning posed a very difficult problem of law enforcement. For its changing interpretation in legal practice certain state trials of the first century A.D. are our best sources of information. In most cases, however, a good deal depended on police agents whose duty would be to ferret out forbidden activities of this kind. A few words about the police organization, one

[16] Paulus (*Sententiae*, V, 21, 3-4), and Ulpian, *de officio proconsulis*, VII (in *Leg. Mos. et Rom. coll.*, 15, 2), summarized the legal views on the subject at the end of the principate. No major changes are recorded for the century which followed.

of whose tasks the enforcement of the Augustan edict did become, seem therefore opportune.

In 11 A.D. the recently (after 6 A.D.) established joint fire-fighting and police corps in Rome numbered about seven thousand freedmen, divided into seven cohorts, a far higher percentage than prevailed, for instance in western capitals at the end of the nineteenth century.[17] At first a provisional imperial organization, these *vigiles,* patterned after long-existing hellenistic municipal police corps,[18] eventually took over what in earlier times had been a senatorial competence. Outside Rome such forces remained under strictly municipal control, making the enforcement of imperial legislation like the edict of 11 A.D. a difficult task. The potential political ramifications of secret astrological consultations on forbidden topics were usually too elusive to be discovered by these brave *vigiles* or their provincial counterpart. The secret police through its far-flung network of agents was better equipped to enforce the Augustan edict. These *curiosi* or *speculatores* at first were usually soldiers or officers in mufti. From the time of the second triumvirate, i.e., after Caesar's death, their numbers and importance grew steadily.[19] By the end of the first century A.D. the peaceful stoic Epictetus described these eyes and ears of the imperial government in terms which have an ominously modern ring:

> " When someone appears to us to discourse frankly on his own affairs, we, too, are in some way induced to discover our secrets to him . . . It is thus that the inconsiderate are caught by the secret agents in Rome. ' A secret police agent sits by you and

[17] Per 10,000 inhabitants in 1891 there were listed: 23 policemen in London and Vienna, 30 in Brussels, 32 in Berlin, 35 in Paris, as against 70 *vigiles* in Augustan Rome (allowing for a population of one million). Figures from O. Hirschfeld, *Die kaiserlichen Verwaltungsbeamten* . . . (2nd ed., Berlin, 1905), p. 254, n. 4; on the *vigiles* in general, *ib.,* pp. 252ff.

[18] Those of Pergamon and Alexandria, for example. During the principate cities like Lyon, Faventia, and Nemausus in the west also developed municipal police corps.

[19] To be inferred from Suetonius, *Augustus,* 27, 3.

> begins to speak ill of the emperor. Then you, as if you had received a pledge of his fidelity by his first beginning of this abuse, say likewise what you think; and so you are led away in chains to execution." [20]

Rome during the principate must have relied chiefly on these or similar methods in obtaining evidence of forbidden astrological consultations. Such violations of the law throughout the empire were undoubtedly prosecuted with varying degrees of severity from Augustus to Valens (d. 378 A.D.), but ancient historians have apparently paid little attention to these provincial transactions. They have preferred, especially those of the first century, to focus attention on the sensational state trials in Rome. They have thereby at least enabled us to trace the hardening of the legal theory of the Augustan edict of 11 A.D. in the fire of court practice.

II. *The Evolution of the Augustan Edict in Legal Practice* (11–49 A.D.)

No record has survived of legal action taken during the last few years of the reign of Augustus to enforce the edict of 11. But beginning with the reign of Tiberius there is evidence to show the application of this law in a series of state trials. Of these, five occurred in the reign of Tiberius and the first eight years of the rule of Claudius. Tried before the Roman senate in its new capacity of a kind of supreme court, the defendants in these cases uniformly belonged to the highest stratum of Roman society. It must, however, be assumed that similar prosecutions took place elsewhere even though none of them reached the eye of posterity. Almost the same situation prevailed concerning astrologers who themselves were eventually caught in the meshes of the edict of 11. For the most part they were obscure men whose fate did not interest the writers of the period. Apart from some general references to the pun-

[20] Epictetus, *Discourses*, IV, 13, 1. For an excellent study of the secret police in the Roman empire, see O. Hirschfeld, "Die Sicherheitspolizei im römischen Kaiserreich" in *Sitzungsberichte der königlichen Akademie der Wissenschaften zu Berlin* (Phil.-Hist. Kl., 30. Juli 1891), XXXIX, 1-33.

ishment of guilty diviners they seem to have recorded only two instances (involving astrologers themselves) during the period in which the Augustan law of topical and technical restrictions received its final molding in the court of Tiberius and Claudius.

This era witnessed the emergence of the legal theory that violations of the edict of 11 A.D. constituted treason *per se* when involving the well-being, or the death of the emperor, and eventually also that of any member of the imperial family. At first, however, indictments for forbidden consultations of this kind formed only part of a general *maiestas* charge which included more traditional indictments. Outright conspiracy to overthrow the government, or crimes like adultery or fraud formed the accusation's main basis, while the breach of the edict of 11 was merely charged to add a more damning touch to the whole. The evolution of the importance of this particular indictment as a foundation for *maiestas* trials can be traced through the following five state trials:

	Date	*Defendant*	*Indictment*	*Verdict*	*Penalty*
	A.D.				
(1)	16	M. Scribonius Libo Drusus	*maiestas*	guilty	suicide before verdict; estate confiscated
(2)	20	Aemilia Lepida	*maiestas*, falsum, etc.	quashed	exile, property assigned to daughter from Mamercus Scaurus
(3)	26	Claudia Pulchra	*maiestas*, adultery, unchastity	guilty? guilty guilty	unknown probably exile
(4) a)	32	Mamercus Aemilius Scaurus	*maiestas?*	quashed?	none
b)	34		*maiestas*, adultery	guilty	suicide before verdict; seven orations burnt, property confiscated?
(5)	49	Lollia Paulina	*maiestas*	guilty	exile, confiscation of most of her estate

The evolution of the *maiestas* crime should perhaps be outlined first in order to explain the use of this legal weapon in the great state trials of the first century and its application in the above-cited cases.

According to prevailing opinion [21] the concept of *lèse majesté* was formed when, following the unification of Italy under Roman leadership, the Carthaginian wars inaugurated the empire-building era, i.e., after 272 B.C. Originally *maiestas* was an attribute of the gods, but now the Roman state came to claim the same prerogative. Until the end of the Republican period, however, and even during most of the reign of Augustus concrete action against the state was the only generally accepted basis for *maiestas* actions.[22] Anyone who openly refused to obey the laws or aimed at the supreme power was considered guilty of the *crimen minutae maiestatis.* High treason (*perduellio*) until the advent of the principate was usually prosecuted by a separate action.[23] During the last century of the republic both actions, the one for *crimen minutae maiestatis* and the other for *perduellio,* were gradually fused into a single *maiestas* indictment.

The oldest, though not well authenticated, attempt of actual *maiestas* legislation may have been a *lex Gabinia* of 139 B.C. It imposed the death penalty in the horrible form of the *mos maiorum* on anyone " who would convene secret meetings in the city." [24] Such an enactment would at least have been in keeping with the known mood of the government and the unrest at Rome in that year when, be it remembered, astrologers and the followers of Jupiter Sabazios were driven from

[21] Against Mommsen and the older views which assumed a much earlier origin of the *maiestas* concept, see Kuebler in Pauly-Wissowa's *Real-Encyklopädie* (*RE*), XIV, 1 (1928), 542ff., esp. section II.

[22] Cicero is the first author referring (in his *de oratore,* II, 25, 107) to a crime *minutae maiestatis.* Under this "new law" a number of cases were prosecuted; see *de natura deorum,* III, 30, 74; compare also, *de inventione,* II, 105; *ep. ad fam.,* III, 11, 2; in Verrem, II, 1, 5, 12; *pro Cluentio,* 35, 97; *in Pisonem,* 21, 50; Tacitus, *Annals,* I, 72.—Nevertheless, according to Suetonius, *Tiberius,* 2, 3, as early as 246 B.C. a Claudia was arraigned on this count for mere words.

[23] The trial of Rabirius in 54 B.C. was one of the last *perduellio* cases on record; see on *perduellio* Chr. Brecht in *RE,* XIX, 1 (1937), 615-639; Rogers, *Criminal Trials,* pp. 206ff.

[24] Porcius Latro, *declamatio in Catilinam,* 19.

the capital, probably on the grounds of adding to the public restiveness.[25] A subsequent *lex Mamilia,* voted in 109 B.C. against Jugurtha's friends in Rome, was soon broadened into what appears to have been the first *lex de maiestate imminuta.* Passed in 103 or 100 B.C., this law, usually referred to as the *lex Apuleia,* covered the crimes of sedition and its forerunner, subversive plotting. A special *lex Varia* of 90 B.C., aimed against Roman supporters of the rebellious "allies", was finally followed by a *lex Cornelia* in 81 B.C. This law became the basis of all subsequent legislation and legal practice concerning *maiestas.* It punished with interdiction from water and fire, i.e., with exile, anyone who overstepped the powers of his office, prevented a magistrate from the exercise of his legitimate authority, damaged Roman sovereignty, or was responsible for a rebellion. Julius Caesar finally in a *lex Julia* of 46 B.C. merged the two actions of *perduellio* and *maiestas* into a single one, the new action of *maiestas.* Henceforth three main types of action constituted the crime of *maiestas:*

(1) *proditio,* i.e., high treason, committed either against the state (desertion, cowardice in battle, etc.) or against individual magistrates, including the ruler.
(2) treason; for instance by participating in conspiracies, including the withholding of the knowledge of plots from the authorities, or the founding of subversive organizations.
(3) Calumny and libel of the government, a crime which at least since the reign of Augustus included attacks against the emperor in speeches or writings.

Prosecution of these crimes in republican days took place before the *comitia.* With their abolition in 14 A.D. the senate became the tribunal for such actions, at least in *maiestas* cases involving Roman noblemen. Its function thus may be compared perhaps to that of the British House of Lords in which "peers of the realm" can still claim a "judgment by their

[25] Valerius Maximus (I, 3, 3) implies as much.

peers" in English law today. While Roman jurists of the principate continued to employ the old term *perduellio,*[26] the legal practice used only the *maiestas* action. This often makes it difficult to discern the actual basis of an indictment, or of a conviction, since it became customary to throw in for good measure a *maiestas* charge along with other less deadly accusations involving adultery, unchastity, or corruption. In an effort to sift the different kinds of crimes for which in the reign of Tiberius, i.e., in the first period of senatorial supreme-court functions, *maiestas* actions were brought in, a distinction has been attempted between *perduellio* charges, *maiestas* cases, and even *quasi-maiestas* indictments.[27] It has already been stressed that during the last years of Augustus, anti-monarchic oral or written utterances, or direct invective against the ruler came to be considered sufficient grounds for *maiestas* actions. In the reign of Tiberius lack of respect for imperial statues or portraits, perjury involving the name of the emperor, claiming of princely honors or prerogatives, violation of the respect due to the sovereign (and soon also the members of his family), or, naturally, any plotting against his person, any or all of these could expose the culprit to *maiestas* indictments. To indulge in extra-marital relations with a daughter or granddaughter of Augustus eventually could also be a *maiestas* crime. Apart from the "loss of face" which the imperial family might suffer from such activities, the possibility of illegitimate claimants of the throne may have caused this extremely serious view taken of amorous antics. Gnawing doubts of this kind beset, for example, Tiberius concerning the paternity of Tiberius Gemellus, his grandson from his son Drusus and Livilla.[28]

For ordinary *maiestas,* i.e., so to speak second-degree *maiestas,* exile remained the chief, but no longer the only punishment. High treason, on the other hand, at all times was pun-

[26] Compare for instance, Ulpian in *Dig.,* 48, 4, 16.

[27] Rogers, *Criminal Trials,* pp. 206ff.

[28] See for example Suetonius, *Tiberius,* 62; Cassius Dio, LVIII, 23, 2.

ishable with death. An imperial refinement in cases of this kind was the granting of a choice of the method of dying to aristocratic offenders. Usually in such instances they chose suicide in which—a Roman " suttee "—faithful wives on occasion joined their husbands. Not infrequently defendants who anticipated being convicted in a pending trial also killed themselves, hoping that by dying " unconvicted " they might perhaps preserve their property for their families, while, after conviction, the confiscation of the entire estate was almost inevitable, a legal situation found also in English Common Law in felony cases. Actually, however, suicide before the verdict by no means guaranteed to a Roman nobleman the financial salvation of his family.[29] Our records of state trials before the Roman senate during the principate list only members of the senatorial or equestrian rank among the defendants. There can be little doubt, however, that the same legal principles applied in the prosecution of lesser men also.

When in Rome, the emperor often presided over *maiestas* trials enacted before the senate. On one occasion the senate convicted and executed a knight, Clutorius Priscus (21 A.D.), without imperial sanction and was sternly reprimanded. Henceforth, Tiberius ruled, a ten-day respite was to be given the convicted in such cases so that imperial clemency might intercede on their behalf. Quite often in the absence of imperial communications in *maiestas* cases the senate postponed action pending the return of the emperor or the arrival of word of his stand in the matter. Rome knew no public prosecutors. *Maiestas* actions therefore were initiated by private prosecu-

[29] Formal *damnatio memoriae* of a convicted defendant by the senate, no matter whether he was dead or still alive, in the days of Papinian (3rd c.) automatically meant the confiscation of his estate (*Dig.*, 31, 76, 9). The practice of the early principate, however, seems to have been somewhat less rigid; compare the unequivocal statement of Tacitus, *Annals*, VI, 29. In corroborating Tacitus, Cassius Dio, himself a contemporary of Papinian (LVIII, 15, 4-16, 1), strengthens the view that the later principate became less tolerant in such matters. Neratius (quoted by Ulpian, *Dig.*, 48, 4, 11) insisted that confiscation was the rule in *perduellio* cases. If true this would simply mean that most of the state-trials of the 1st c. A.D. were only " second-degree " *maiestas* cases, not *perduellio* ones.

tors in the manner of a private law-suit against an ordinary defendant. In cases of this kind, however, the public interest was at stake to a greater degree than usual. There was therefore frequently direct imperial intervention on behalf of one side or the other, including imperial orders for the sale of a defendant's slaves so that these, legally unable to testify against a master, could now as "state slaves" be subjected to torture for the procuring of evidence against their former masters.[30] Occasionally imperial orders were also issued to quash one or all counts of an indictment, or on the contrary "instructing" the senate to find the defendant guilty. Instances of this kind attest to the fluidity of legal practice in *maiestas* trials during the early principate. In any case the financial [31] and political incentive of bringing in indictments of *maiestas* was great enough to encourage not only sincere supporters of the government, but also unscrupulous accusers to tack a *maiestas* charge onto many indictments of ranking Romans for assorted other crimes. Even if no conviction on the treason count resulted, the record of having been under a *maiestas* accusation inevitably tended to blacken the character of an acquitted defendant. The main preventive against wholly fabricated *maiestas* charges was the threat of a *calumnia* action against accusers who lost such law-suits. Exile of one kind or another seems to have been the penalty for conviction of *calumnia*.[32]

It thus is clear that the Augustan edict of 11 A.D. was likely to provide splendid material for *maiestas* charges. Imperial faith in the infallibility of astrology created a fertile psychological soil for accusations of forbidden astrological consultations. Scientific astrology never became the favorite form of

[30] For example in the cases (1) and (2) discussed below.

[31] Compare Tacitus, *Annals*, II, 32; IV, 20; Cassius Dio, LVII, 19, 2; LVIII, 4, 8. In the case of Libo Drusus (16 A.D.) the accusers received their share even when the defendant had committed suicide before the verdict, but had posthumously been found guilty; see Tacitus, *Annals*, II, 28 and 30; Cassius Dio, LVII, 15, 5.

[32] Compare Strachan-Davidson, *Problems of the Roman Criminal Law* (1912), II, 138; cf. Rogers, *Criminal Trials*, pp. 197f.

divination among the Roman masses, but it obtained at this time a firm hold on the minds of Rome's upper class. Predictions based on astrology (and magic) were preferred by it to those obtained from older forms of divination. In this atmosphere, encompassing the nobility and the imperial court in the reigns of Tiberius and Claudius, the Augustan law of technical and topical restrictions was translated into legal practice.

Case (1)

Scribonius Libo Drusus was indicted for *maiestas*[33] in the late summer of 16 A.D., probably around September first. There had been some earlier suspicion of his loyalty, but these doubts apparently were allayed. For Tiberius had permitted the young man to become praetor. Nevertheless the spendthrift Libo seems to have continued to nurse high ambitions. Modern scholars have tended to redraw the harsh Tiberian portrait provided by the aristocratic sources of Tacitus (who nowadays is often accused of purely partisan malice in blackening the record of Tiberius' reign and of his personality). In consequence the Tacitean view of Libo as a giddy-headed young fool, who was quasi-innocently indulging in at least ambiguous activities, has been seriously questioned. Libo thus came to be considered a real menace, while the gentle soul of Tiberius reluctantly was driven to take extreme measures against this dangerous plotter. To anyone who in the ever-present historical record finds incontrovertible evidence of the corrupting influence of political power on even the best of mortals these modern reappraisals must remain unconvincing. The great and relatively mild rulers of the principate from Nerva to Marcus Aurelius dealt with a tamed Roman nobility. Their predecessors, however, had done the taming. They had been faced with an aristocratic opposition of not inconsiderable strength. In the reign of Tiberius anti-monarchic traditions were still strong within the great families of Rome,

[33] For a detailed appraisal of the general aspects of this trial, see Rogers, *Criminal Trials*, pp. 12ff.

while, on the other hand, ambitious individuals constantly looked for ways and means to put themselves on the imperial throne.

The most impartial appraisal perhaps of Libo's plot and of the young man's character is that of Seneca who spoke of him as of a man "who in that age hoped for greater things than anyone could hope for, or than he could hope for in any age."[34] Against this coolly calculated view (which basically supports the Tacitean opinion of the young conspirator) modern attempts to elevate Libo to the level of Catilinian plotting stand up with difficulty.[35] The *Fasti Amiternini* recorded for September 13, 16 A.D. that Libo had harbored "nefarious plans" against the life (*de salute*) of Tiberius, his children, and other ranking citizens, as well as against the state.[36] This accusation was reiterated in all subsequent literary records. Velleius Paterculus, writing less than fifteen years after the trial, in his ardently pro-Tiberian *Roman History* referred to Libo's plans as *scelerata*.[37] Seneca, although expressing himself in more cautious terms (quoted above) left no doubt of Libo's treasonable aspirations. Tacitus quoted the official accusation as follows: *moliri res novas,* i.e., planning a coup d'état.[38] Suetonius, perhaps using the same source as Tacitus, couched his brief reference in a more factual manner. While Tacitus carefully dissociated himself from the actual accusation by merely saying that Libo was *denounced* for such activities, Suetonius simply reported as a fact that Libo *res novas clam moliebatur,* i.e., that Libo plotted a coup.[39] Cassius Dio

[34] Seneca, *ep.*, 70, 10.

[35] See for instance, Rogers, *loc. cit.*, F. B. Marsh, *The Reign of Tiberius* (Oxford, 1931), pp. 59f., and in "Tacitus and Aristocratic Tradition," *Classical Philology,* XXI (1926), 291-304, esp. 300f.; also Rogers in *Studies in the Reign of Tiberius* (Baltimore, 1943), pp. 27, 46, 48, 76f. (with a somewhat doubtful interpretation of Velleius Paterculus, II, 129, 3), 84, 115f.

[36] *CIL,* I (2nd ed.), no. xv, p. 244.

[37] II, 130, 3: "quid hic [Tiberius] meruit ut scelerata Drusus Libo iniret."

[38] *Annals,* II, 27: "Libo Drusus defertur moliri res novas."

[39] Suetonius, *Tiberius,* 25, 1-2.

in turn followed the more cautious Tacitean version by relating that Libo *apparently* planned some coup.[40]

The text of the *Fasti* undoubtedly reflected the official view. For the future development of court procedure in prosecutions involving a breach of the Augustan edict of 11 A.D. the distinction between the *de salute* indictment and the one for *de republica* plotting was important. It showed the merging of the old and the new pattern of *maiestas* accusations. The *salus* of the emperor, his house, and individual ranking citizens on the one hand, and the existing government's survival, on the other, were seen as endangered by Libo's conspiracy. The *maiestas* indictment was made on these two counts jointly. Apparently for the first time forbidden consultations with astrologers and other diviners, and even with necromancers and other sorcerers, were introduced as incriminating evidence in such a case. Whether or not these violations of the Augustan edict and of the laws against black magic were committed at the instigation of an *agent provocateur* by the name of Firmius Catus could hardly influence the legal evaluation of such acts. It was proven beyond any doubt that Libo had sought " the promises of the Chaldaeans, the rites of sorcerers, as well as the interpreters of dreams." [41] Astrological promises of future grandeur, obtainable obviously only by the success of Libo's conspiracy against the ruler and his house, thus constituted an important part of the evidence against a traitor. This evidence, however, was not yet considered in itself *prima facie* proof of *maiestas*. It was merely used to confirm the general charge of treason from one important angle. The ludicrous character of his inquiries was illustrated by one of the questions actually submitted by Libo to astrologers and other diviners: " Would he ever be wealthy enough to cover with money the pavement of the Appian road [from Rome] as far as Brindisi?" [42]

[40] Cassius Dio, LVII, 15, 4: [Libo] δόξαντά τε νεωτερίζειν.

[41] Tacitus, *Annals*, II, 27; compare also 28ff.

[42] Tacitus, *Annals*, II, 30.

For the four accusers Vibius Serenus undertook to act as spokesman. He presented the charges, beginning with the above-mentioned violations of the Augustan edict.[43] The importance of this particular section of the indictment has recently been questioned,[44] but there can be no doubt that Tiberius and his legal advisers, all of whom were probably confirmed believers in astrology, attached great importance to it,[45] even though they were not yet ready to impose the penalties of exile or death for violations of the Augustan edict of 11 A.D. alone. Additional evidence of *perduellio* was still required before the full rigor of the *lex Julia* of 46 B.C. would be invoked. One of the most damning bits of evidence introduced at Libo's trial was his notebook which in his own writing contained "fearful or coded" entries (*atroces vel occultas*) behind the names of the Caesars and certain senators.[46]

The obvious interpretation of this find was that these persons had been the topic of forbidden divinatory or magical consultations. Libo protested feebly that the damning notebook was not his own, but his statement fell on sceptical ears. For had not a certain necromancer by the name of Junius been among the first informers against Libo, who had asked the man to employ his magical prowess on his behalf?[47] In such intimate matters as forbidden astrological consultations the testimony of a defendant's slave would often be a vital source of evidence. Traditionally slaves in cases of this kind were not permitted to give evidence against their masters. They therefore could not be questioned by the prosecution. Although Tacitus asserted that Tiberius was the first to use the

[43] The four were Firmius Catus, Fulcinius Trio, Fonteius Agrippa, and C. Vibius Serenus; Tacitus, *ib.*, II, 27-30.

[44] See for instance, F. B. Marsh, *The Reign of Tiberius,* p. 59, n. 1.

[45] Thus rightly Rogers, *Criminal Trials,* p. 15, specifically criticizing the psychology of Marsh, who assumed that our own scepticism about divination was shared by Tiberius and his counsellors.

[46] Tacitus, *Annals,* II, 30.

[47] *Ibid.,* 28.

legal device of ordering the sale of a defendant's slaves to the state with the purpose of obtaining their testimony,[48] the beginnings of this technique apparently went back again to the crucial last decade of Augustus' reign.[49] The change thus would coincide with the general alteration of Augustan policies from more liberal towards more restrictive tendencies.

The testimony of his former slaves seems to have established the guilt of Libo on all counts beyond any reasonable doubt. Despairing of his cause Libo killed himself.[50] Since his indictment of *maiestas,* however, charged *perduellio,* his suicide before the actual verdict did not affect the fate of his estate. The senate having convicted the defendant posthumously, his property was confiscated and divided up, even though Tiberius vetoed a senatorial *damnatio memoriae.* The date of the plot's discovery became an official Roman "Guy Fawke's Day" (Sept. 13).[51] Nevertheless the almost frantic modern insistence on the importance of Libo's plot remains hard to reconcile with the incontrovertible evidence of his empty-headed personality. That a gay fool like Libo should pose a serious threat to the Tiberian power, especially in view of the apparent lack of army support of his plot, must arouse at least serious doubt. The prosecution was "attempting, and probably with success, to show that the defendant was guilty of such traffic with astrologers as was interpreted by the *lex Julia maiestatis* [and the more recent edict of 11 A.D.] as *perduellio.*" [52]

[48] *Loc. cit.,* 30; Cicero, *pro Milone,* 22, 59, as well as *Dig.,* 48, 18, 4 and 10, 1 seem to contradict Tacitus, but then there never was any lack of contradictory *senatus consulta.*

[49] Paulus (in *Dig.,* 48, 18, 8) quoted a pertinent Augustan edict of 8 A.D.; cf. Rogers, *Criminal Trials,* pp. 16-18.

[50] Tacitus, *Annals,* II, 31; Cassius Dio, LVII, 15, 5; Seneca, *ep.* 70, 10.

[51] *Fasti Amiternini* in *CIL,* I (2nd ed.) no. xv, p. 244; compare, *CIL,* VI, nos. 91-94, p. 15.

[52] Rogers, *Criminal Trials,* p. 16.

Case (2)

Four years afterwards another state-trial took place which involved violations of the edict of 11 A.D. Towards the end of the summer of 20 A.D. one of the ranking society matrons of Rome was accused of forbidden astrological consultations. These charges again were not the only ones brought against her at this time, but merely constituted a *maiestas* indictment tacked onto other accusations, including those of adultery and *falsum,* as well as of the attempted poisoning of her former husband Quirinus.[53] The illustrious descent of the defendant contributed to the sensation of her trial. Sulla and Pompey were among her great-grandparents, the late triumvir Marcus Lepidus was her grandfather. Augustus at one time had deemed her worthy of being the fiancée of his own grandson L. Caesar.[54] The engagement was dissolved, however, sometime before the young man's premature death, which had paved the way for Tiberius' rise to imperial power. For in 4 A.D. Aemiliâ Lepida had already been married for years to an elderly Augustan general, a self-made man of proven merit: Publius Sulpicius Quirinus.[55]

Normally Roman brides had to have attained the age of twelve, at least. Since Suetonius, on the one hand, reported that this marriage lasted for twenty years,[56] and Tacitus, on the other, that at the time of her trial in 20 A.D. Aemilia Lepida had been married to (and perhaps even been already divorced from) Mamercus Aemilius Scaurus,[57] to whom she had borne a daughter, Aemilia Lepida must have been at least in her late thirties. She was therefore born probably between 20 and 15 B.C. Her future husband Quirinus at that time had already advanced to high rank in the armies of Augustus. His

[53] Tacitus, *Annals,* III, 22.

[54] *Ib.,* 23.

[55] Suetonius, *Tiberius,* 49, 1.

[56] Suetonius, *loc. cit.*

[57] Tacitus, *Annals,* III, 23.

long-standing friendship with Tiberius [58] may well have been established during the years following the birth of Aemilia Lepida, while Tiberius himself rose to the highest military offices of the empire. In 12 B.C. Quirinus became consul. Some years later he married Aemilia. Being a man without illustrious ancestors he may well have been forty at the time of his consulate and thus on the wedding-day would be approximately three times as old as his child-bride. This was not an unusual age difference for Roman society marriages, but it may help to explain the eventual estrangement between the old warrior and his wife.

Suetonius and Tacitus ascribed the interest of Tiberius in Aemilia's unpopular trial in 20 A.D. to his hope of reaping financial benefits from the will of his wealthy and—if Aemilia Lepida's alleged offspring from Quirinus should be proven spurious, as the indictment alleged—childless friend.[59] More likely, however, seems the suggestion of Suetonius that the emperor's motive was chiefly his desire to support the embattled Quirinus as a friend.[60] For after the trial and conviction of Aemilia Lepida Tiberius allowed her immense property to pass in trust into the hands of Quirinus' successor, i.e., her second husband Mamercus Scaurus.[61] Another indication of the emperor's desire to eliminate all but those charges pertinent to the defendant's conduct with relation to Quirinus was the quashing of the *maiestas* indictment which had charged Lepida with " having conspired through astrologers against the house of Caesar." [62] A woman could never expect to rule the empire in her own right. Lepida's forbidden inquiries could therefore not have been on this subject. A modern suggestion that Manius Lepidus, Aemilia's brother, had been the person

[58] Quirinus was among the few who dared visit Tiberius at Rhodes when almost everyone shunned the semi-exile; Tacitus, *Annals,* III, 48.

[59] Suetonius, *Tiberius,* 49, 1; Tacitus, *Annals,* III, 22.

[60] Marsh, *The Reign of Tiberius,* pp. 272f.

[61] Tacitus, *Annals,* III, 23.

[62] *Ib.,* 22: " quaesitumque per Chaldaeos in domum Caesaris . . . ."

about whose imperial prospects the defendant had consulted astrologers is equally untenable.[63] Not only was Lepidus himself unindicted (as would otherwise have been the case), but he was even permitted to conduct his sister's defense before the senate, while Tiberius—hardly an impartial judge in this case—presided over the trial.[64] Since Lepida's ex-husband Quirinus could not very well have been the topic of her forbidden inquiries, the only remaining possibility would be her present (or very recently divorced) second husband Mamercus Scaurus. He himself seems to have entertained no major political aspirations, but an ambitious wife might nevertheless have probed his (and her) future political prospects. Although Mamercus Scaurus eventually was convicted of *maiestas,*[65] he was at this time (20 A.D.) still—or again—beyond the shadow of imperial suspicion.[66]

Other possible topics of forbidden inquiries touching more indirectly upon the imperial house might have been whether the stars foretold Lepida's divorce from Scaurus[67] and her subsequent remarriage to a member of the imperial house, perhaps even to Tiberius' son Drusus. Tiberius himself does not seem to have taken the *maiestas* charge seriously. He did not even permit Lepida's slaves to be questioned on the subject under torture. He extracted from the slaves of Quirinus, however, ample evidence of her attempt to poison the old general. Torture also elicited more than sufficient proof of the defendant's scandalous life. Her conviction, however, was based not on the poisoning, but only on the counts of adultery and, possibly, of *falsum.* For the incriminating evidence about her poisoning efforts was disclosed by Tiberius only after convic-

[63] See, however, Rogers, *Criminal Trials,* p. 52; Augustus is said to have considered him as a potential candidate for the throne; Tacitus, *Annals,* I, 13.

[64] Tacitus, *Annals,* III, 22.

[65] In 34 A.D.; see below, case (4).

[66] He was not indicted and received after the trial the administration of Aemilia's fortune on behalf of their daughter, a minor.

[67] Compare Rogers, *Studies in the Reign of Tiberius,* p. 11.

tion and sentence had been voted by the senate. She was exiled (and probably divorced at once if not already prior to the trial by Scaurus). In the very next year her first husband, Quirinus, died [68] and her second, Scaurus, became *consul suffectus*.[69] From the extant sources it appears that at this trial a legal attempt was made for the first time to base a *maiestas* charge solely on a violation of the edict of 11 A.D. involving the imperial family's destinies. This legal concept, however, was obviously not yet approved by the government.

Case (3)

The popularity of forbidden astrological and other divinatory consultations among Rome's high-ranking ladies in the reign of Tiberius was attested by another state trial involving charges of such practices. In 26 (or 27 [70]) A.D. again a woman faced the senate: Claudia Pulchra, a "beauteous Claudian." It has been suggested that this trial marked the beginning of the great family feud between the Claudian and the Julian branch of the imperial house,[71] the former represented by Tiberius and his grandson Tiberius Gemellus, the latter by Claudia Pulchra's intimate friend, Germanicus' widow Agrippina and her children. The man who launched the accusation against Pulchra in 26, Domitus Afer, earned the deep-seated dislike of Agrippina's youngest son Caius for this action and almost lost his life thirteen years later when Caius, now invested with the imperial purple, had him tried on a *maiestas* charge.[72]

[68] Tacitus, *Annals,* III, 48.

[69] See below, p. 37; Rogers, *op. cit.,* pp. 11, 45, 71, 126, 150f. and, *Criminal Trials,* pp. 51ff. for various aspects of the trial and conviction.

[70] Marsh, *The Reign of Tiberius,* p. 179. This seems an error, since Tiberius left Rome in 26, never to return. His interview with Agrippina during the trial, however, seems to have taken place in Rome.

[71] Tacitus, *Annals,* IV, 52.

[72] Cassius Dio, LIX, 19, 1-7; 20, 1. On Afer's eloquence, see also Tacitus, *Annals,* XIV, 9; *Dialogus,* 13 and 15. He died in the reign of Nero.

The indictment of Claudia Pulchra consisted of several counts: Immorality (*impudicitia*), adultery, and *maiestas,* committed by an attempt to poison the emperor and to employ magic arts (*devotiones*) against him.[73] Normally the *lex Cornelia de sicariis et veneficis* would be invoked on the last charge, but since the person of Tiberius had been the target of Claudia Pulchra's alleged crime, the proper action was the one of *maiestas.* If the defendant had actually engaged in forbidden practices she may have also consulted diviners about the probable success of her efforts against Tiberius.[74] No violation of the edict of 11 A.D. was officially charged, however, and the extant record of her trial does not even reveal whether she was convicted on the *maiestas* indictment, or whether, as in the case of Aemilia Lepida, these secret practices were considered insufficient to substantiate *per se* a charge of *maiestas.* She and her latest paramour were found guilty of adultery and punished.[75] Thus vanished from the Roman scene the widow of the luckless Quintilius Varus who in 9 A.D. had shared the fate of his doomed legions in the murky forests of Germany.

Case (4)

With Marcus Aemilius Scaurus, consul 115 B.C., a hitherto inconspicuous family entered the circle of Rome's dominant clans. His great-grandson, Mamercus Aemilius,[76] in almost all other respects an unworthy descendant of this illustrious ancestor, retained at least two respectable family traditions:

[73] Tacitus, *Annals,* IV, 52.

[74] In the very next year apparently her son Quintilius Varus was indicted; see Tacitus, *Annals,* IV, 66. Was it perhaps about his political prospects, if not about those of Agrippina's family that Claudia Pulchra had sought refuge in the use of magic or, possibly, forbidden consultations?

[75] Tacitus, *Annals,* IV, 52. Rogers (*Criminal Trials,* p. 92) agrees that we have no way of knowing if Claudia Pulchra was convicted on the *maiestas* charge. Nevertheles he lists her (*ib.,* p. 207) as convicted of *perduellio.* On the probable penalty, exile and property confiscation, see Marsh, *The Reign of Tiberius,* p. 179.

[76] Tacitus, *Annals,* III, 66.

He remained opposed to the monarchic form of government, and—a rare exception—he could not be bought to exercise his considerable influence in the senate, the law courts, or with the emperor.[77] On the other hand, he entertained apparently no great political ambitions. To the army camp or the onerous duties of governing a province he preferred the pleasures of Rome. The theatres and literary circles, the boudoirs and the senate chamber were the world in which he shone. A dilettante grandseigneur, he earned the reputation of being the most fluent orator of his time,[78] yet he never took the trouble of endowing his writings with the elegance and effectiveness of his oral efforts.[79]

It seems that Tiberius at the time of his accession in 14 A.D. entertained some suspicion concerning the loyalty of Scaurus,[80] but these fears were allayed, perhaps due to the support which Scaurus gave to the rising imperial favorite, Sejanus. It has already been mentioned that Tiberius during the trial of Scaurus' wife Aemilia Lepida in 20 A.D. demonstratively expressed his belief in the political integrity of Scaurus.[81] In Shakespeare's *Henry VI* the duchess of Gloucester takes to consulting witches about her own and her husband's political future, the duke of Gloucester being entirely ignorant of his wife's activities. In his case her ruin destroyed him also. Not so in the case of Aemilia Lepida. Unless Scaurus had already divorced his guilty spouse before her trial, he must have done so soon after her conviction. It was not long, however, before Lucius Sulla (whom Scaurus had adopted) involved him in a bitter intra-senatorial squabble which the young man had set off by a wholly unwarranted attack upon Domitius Corbulo, a respected member of the older generation. Early in 21 Scaurus had been prevailed upon, apparently under strong pressure

77 Cassius Dio, LVIII, 24, 3.

78 Tacitus, *Annals,* III, 31: "oratorum . . . uberrimus."

79 Seneca rhetor, *Controversiae,* X, *pr.,* 2-3.

80 Tacitus, *Annals,* I, 13.

81 See above, case (2).

from Tiberius' son Drusus, to apologize to Corbulo for Sulla's behavior.[82] Apparently as a sop for his wounded pride he received later in the year the appointment as *consul suffectus*.[83] It was perhaps at this height of his good fortune that Scaurus remarried, his choice being Sextia, a high-spirited woman of remarkable strength of character. She seems to have been the mother of the above-mentioned L. Sulla from a previous marriage, and Scaurus in adopting his stepson would have followed good Roman precedents, Tiberius himself being the adopted stepson of Augustus.

During the early 'twenties Scaurus continued his alignment with Sejanus. Together with two other members of that faction, for example, he accused C. Junius Silanus, ex-governor of Asia, of maladministration (*repetundae*) and obtained his conviction in a trial over which Tiberius himself presided.[84] The first lightning across the horizon of Scaurus flashed in 24/25 when the well-known scholar Votienus Montanus was punished with exile to the Balearic islands (where he died in 27)[85] for "literary treason."[86] Scaurus thought highly of him, calling him "an Ovid amongst orators,"[87] and perhaps defended him in some writings.[88] For the time being, however, the all-powerful Sejanus may have shielded Scaurus from the dangerous consequences which otherwise might have befallen a supporter of Votienus Montanus. Nor did Sejanus break with Scaurus when the senator replaced the praetorian prefect in

[82] Tacitus, *Annals,* III, 31.

[83] *CIL,* IV, no. 1553, p. 99; *Acta Arvalium,* in *CIL,* VI, 1, no. 2023b, lin. 16f., p. 461. His colleague was Cn. Tremelius. Seneca, *de beneficiis,* IV, 31, 3-4, refers to his "campaign" for the consulate; Tacitus, *Annals,* III, 66, calls him an ex-consul.

[84] Tacitus, *Annals,* III, 66.

[85] Jerome, *Chron., ol.* 201.

[86] Tacitus, *Annals,* IV, 42.

[87] Seneca rhetor, *Controversiae,* IX, 5, 17.

[88] *Ib.,* X, *pr.,* 3. These were possibly among the writings of Scaurus subsequently sentenced to the flames by the senate.

the affections of the notorious Livilla. Since this particular conquest was the cause of Scaurus' final ruin, the road to his fatal trial of 34 A.D. must be briefly traced.

In 23 A.D. Livilla, wife of Tiberius' only son and heir designate, Drusus, poisoned her husband. The deed was committed through her physician Eudemos, one of her many paramours.[89] The real instigator, however, was Sejanus, with whom Livilla had become infatuated even though he was her senior by a good many years, married, and the father of three children.[90] Victorian respectability, however, was alien to Roman society in those days. Sejanus, having divorced his faithful wife Apicata, petitioned Tiberius to allow him to marry the conveniently widowed Livilla. The emperor turned down this request of his favorite, but did it in the most polite manner.[91] Gradually the relations between Livilla and Sejanus seem to have cooled thereafter, and Scaurus, notorious for his profligacy even in a profligate era,[92] was among the men who consoled her. Finally Sejanus succeeded in overcoming the emperor's objection to a marriage alliance between him and the imperial family. There is some confusion about the fiancée allowed the favorite towards the very end of his life, but the more probable assumption is that Sejanus became engaged to Livilla's daughter Julia.[93]

The fall of Sejanus in October, 31 A.D. launched the series of events leading to the doom first of Livilla, then of her last

[89] Pliny, *Nat. Hist.*, XXIX, 8, 20; compare (about Sejanus' tampering with Livilla's eunuch Lygdus in connection with the murder of Drusus) Tacitus, *Annals*, IV, 10.

[90] Tacitus, *Annals*, IV, 3; compare Cassius Dio, LVII, 22, 2 and 4b.

[91] Tacitus, *Annals*, IV, 39-40; compare IV, 10.

[92] Tacitus, *Annals*, VI, 9; Seneca, *de beneficiis*, IV, 31, 3-4.

[93] F. B. Marsh (*The Reign of Tiberius*, pp. 192, n. 1, and 226) believes that Livilla herself was the belated fiancée. Julia's husband Nero, the oldest son of Germanicus, perished in the same year as Sejanus, but she may have been divorced from Nero at an earlier date; compare Cassius Dio, LVIII, 3, 9 and 7, 5.

paramours, including Scaurus.[94] The death of Sejanus was immediately followed by the execution of his children. His oldest son, Aelius Strabo, was killed on October 24, 31.[95]

> " It was then determined that the surviving children of Sejanus should pay the penalty . . . They were therefore carried to the dungeon, the boy conscious of the fate in store for him, the girl so completely ignorant that she asked repeatedly what her offence had been and to what place they were dragging her: She would do wrong no more, and she could be cautioned with the usual beating administered to children . . . As it was an unheard-of thing for capital punishment to be inflicted on a virgin, she was violated by the executioner with the halter beside her: they were then strangled, and their young bodies thrown down the Gemonian stairs." [96]

Apicata herself

> " was not condemned, . . . but on learning that her children were dead, and after seeing their bodies on the Stairway, she withdrew and composed a statement about the death of [Tiberius' son] Drusus, directed against Livilla; then after sending this document to Tiberius, she committed suicide." [97] (Oct. 26, 31.)

A Roman Niobe, Apicata in dying achieved her revenge: She dragged Livilla, who had wrecked her life, after her. Tried, convicted, and executed,[98] Livilla atoned for her sins, but even

[94] Cassius Dio, LVIII, 24, 5.

[95] *Fasti Ostienses* in *Not. Scavi,* VI (1930), p. 186; cf. Rogers, *Criminal Trials,* pp. 118f. Tacitus (*Annals,* IV, 3) states that Apicata bore Sejanus three children. That Aelius Strabo must have been the oldest follows from the Tacitean passage quoted above.

[96] Tacitus, *Annals,* V, 9; Suetonius, *Tiberius,* 61, 5; Cassius Dio, LVIII, 11, 5; compare Valerius Maximus, IX, 11, 4; the daughter of Sejanus must have been at least eleven years old; for as early as 20 A.D. she was already betrothed—obviously in infancy—to young Drusus, son of the future Emperor Claudius; Tacitus, *Annals,* III, 29; Suetonius *Claudius,* 27, 1; Cassius Dio, *ep.* LXI, 32, 1.

[97] Cassius Dio, LVIII, 11, 6; compare Tacitus, *Annals,* IV, 11.

[98] Tacitus, *loc. cit.,* and *ib.,* V, 6; Cassius Dio, LVIII, 11, 7 (where Livilla is handed to her mother who starves her to death); Suetonius, *Tiberius,* 62, 1; cf. Rogers, *Criminal Trials,* pp. 119ff.

from the grave she destroyed her paramours. Scaurus' time had come.

Within a year after Livilla's death he was indicted of *maiestas* by a certain Tuscus.[99] Even then his luck still held. For apparently the indictment was quashed or, at least, its prosecution suspended. Nevertheless the suspicions of Tiberius seem to have been aroused, and Sejanus' successor in Rome, the new praetorian prefect Naevius Macro,[100] contributed to the estrangement. He skillfully insinuated that Scaurus was guilty of "literary treason." To prove this he quoted a number of verses from a play *Atreus* which Scaurus (who obviously fancied himself also as a tragic poet)[101] had written.[102] A passage which aroused the emperor's special ire advised—a lift from the *Phoenissae* [103]—the subjects to bear the follies of their prince with patience. Assuming that this reference to Atreus was actually aimed at himself Tiberius is said to have exclaimed that he would make an Ajax out of Scaurus, i.e., drive him to suicide.[104] Actually, however, a new *maiestas* indictment, brought in 34, did not contain an accusation of literary treason, but the two plaintiffs, Servilius and Cornelius, charged Scaurus with the use of, or participation in magic rites (*magorum sacra*) and with adulterous relations with Livilla, now dead for about three years.[105]

Adultery with women of the imperial family had been punished by Augustus with exile, although—if Tacitus can be trusted—no law or senatorial decree called for such a pen-

[99] Seneca rhetor, *Suasoriae*, 2, 22; Tacitus, *Annals*, VI, 9. On the date and other details, see Rohden in *RE*, I (1894), c. 583; Rogers, *op. cit.*, pp. 154 and 206; Guengerich in *RE* (2. Reihe), XIV, 1 (1943), 1492f.

[100] Tacitus, *Annals*, VI, 29; Cassius Dio, LVIII, 24, 4-5.

[101] Apparently the poet mentioned by Suetonius, *Tiberius*, 61, 3.

[102] Tacitus and Cassius Dio, *loc. cit.*

[103] v. 393: τὰς τῶν κρατούντων ἀμαθίας φέρειν χρέων.

[104] Cassius Dio, *loc. cit.*

[105] Tacitus, *Annals*, VI, 29; Cassius Dio, LVIII, 24, 5.

alty.[106] Tiberius himself apparently took a less violent view of such matters. Although Tacitus averred that Scaurus' past alignment with Sejanus was not the cause of his fall in 34 A.D., there may be a hidden meaning in the historian's assertion that Macro, the man chiefly responsible for the indictment, practiced the same arts as Scaurus but with greater secrecy.[107] One wonders what arts Tacitus alluded to: Adultery? Tragic poetry? Magic rites? A competent modern writer on the subject sees in the *magorum sacra* of Scaurus astrological consultations,[108] a hypothesis which does sound plausible. It would explain at least the indictment for *maiestas,* assuming that the adultery charge, in the reign of Tiberius at least, could not be the basis of a *maiestas* indictment even when "imperial ladies" were involved. If, then, Scaurus and Macro had practiced the same arts—and Macro avowedly was never a poet—would it not seem likely that both men consulted astrologers on forbidden topics? The far-famed and powerful astrologer Thrasyllus, Tiberius' intimate friend, was the grandfather of Macro's wife and must have been exceedingly well informed of what went on amongst the more important astrologers at Rome. He may even have advised Macro of Scaurus' efforts to probe the future, i.e., of his astrological consultations about the date of Tiberius' death and perhaps about the name of his successor. That Macro, whose very life might depend on such foreknowledge, was equally guilty of similar inquiries can hardly be doubted. The *Atreus* incident would thus have been a ruse on the part of Macro to stir up the wrath of Tiberius, while the formal indictment for *maiestas* would be based solely on the grave violation of the edict of 11 A.D., a violation involving not only a forbidden question "about anyone's death," but about the death of the emperor himself. The trial of Scaurus would thus provide an important step towards the

[106] Tacitus, *Annals,* III, 24; compare II, 50; cf. Rogers, *Criminal Trials,* p. 192.

[107] *Ib.,* VI, 29: "easdem artes occultius exercebat."

[108] Rogers, *Criminal Trials,* p. 152.

clarification of the Augustan edict in legal practice: Henceforth forbidden inquiries about the emperor (*de salute principis*) would be treated as *prima facie* evidence of *maiestas*. In this light Tacitus' statement that Scaurus did not owe his fall to his former friendship with Sejanus but to the present enmity of Macro would be perfectly accurate.

No details of the trial itself have survived. Scaurus realized that his cause was lost. Spurred on by his wife Sextia he preferred suicide to death at the hands of the public executioner. She joined him and died by her own hand, an example of feminine courage not uncommon among the ranking matrons of that era.[109] Whether seven orations of Scaurus were condemned to the flames at this time by the senate,[110] or whether this had already been done on an earlier occasion, remains unknown.

Case (5)

In 246 B.C. what may have been the first *maiestas* trial of a woman was conducted against a Claudia.[111] Now, almost three hundred years later, a Claudius in turn staged a *maiestas* trial against a woman: Lollia Paulina. In the history of the legal practice concerning violations of the edict of 11 A.D. her case marked the end of the evolutionary period. Thereafter astrological inquiries or those addressed to other diviners about the imperial family, not merely the emperor himself, were steadily considered *prima facie* evidence of *maiestas*. The antecedents of this trial, which probably took place early in 49 A.D., were highly dramatic. Like Aemilia Lepida (case (2)) and Claudia Pulchra (case (3)), Lollia Paulina belonged to the very highest stratum of the Roman nobility. Her wealth was legendary. Her jewelry alone was estimated worth 40,000,000 sesterces.[112] Her grandfather (consul 21 B.C.), had

[109] Tacitus, *Annals*, VI, 29.

[110] Seneca rhetor, *Controversiae*, X, *pr.*, 3.

[111] Suetonius, *Tiberius*, 2, 3.

[112] Pliny, *Nat. Hist.*, IX, 58, 117; Solinus, 53, 29.

come to grief when found guilty of dubious practices with oriental princes. Young C. Caesar (whose adviser the old man was at the time) had humiliated him beyond redemption. He died a few days later,[113] probably by suicide,[114] but Augustus apparently did not proceed against the family, nor withdraw his favor from it. For Lollia Paulina's father was made *consul suffectus* during the last decade of Augustus' reign.

Apart from her social standing and her wealth Lollia was one of Rome's most beautiful women, a legacy perhaps from her beauteous grandmother.[115] Her first husband was P.[116] Memmius Regulus, a former consul and a military commander of repute, whom she accompanied when he became governor of Asia. The emperor Caligula in her absence conceived a sudden passion for her, insisted on a divorce from Memmius and married her himself in 38,[117] apparently after an unusual divorce ceremony.[118] He tired of her soon, however, and divorced her under the pretext that she was barren, forbidding her, nevertheless, to have intercourse with any other man thereafter,[119] a command which the proud and beautiful woman was not likely to obey. The former empress did not remarry, but in 48 was put forward as a candidate for the imperial bed of Claudius, recently vacated by Messalina of odious memory.[120] In the three-cornered race between herself,

[113] Pliny, *loc. cit.*, 118; Solinus, *loc. cit.;* Velleius Paterculus, II, 102; compare on him also Suetonius, *Tiberius,* 12; Tacitus, *Annals,* III, 48.

[114] Rightly assumed by Groag in *RE,* XIII (1926), 1377-78 [no. 11]. According to Pliny, Lollius drank poison.

[115] Suetonius, *Caligula,* 25.

[116] Not *C.* as Suetonius (*loc. cit.*) calls him.

[117] Tacitus, *Annals,* XII, 22; Suetonius, *loc. cit.;* Pliny, *Nat. Hist.,* 58, 117-118; Solinus, 53, 29.

[118] Eusebius-Jerome, *Chronica, ol.* 204, without mentioning Lollia by name; cf. Stein in *RE,* XIII (1926), 1394f.

[119] Suetonius, *Caligula,* 25; compare also Cassius Dio, LIX, 12, 1; Zonaras, XI, 5.

[120] Tacitus, *Annals,* XII, 1; compare F. Münzer in *Festschrift zu O. Hirschfelds 60. Geburtstag* (1910), p. 38.

Claudius' former wife, Aelia Paetina, and Germanicus' widowed daughter, Agrippina, Lollia Paulina lost out to Agrippina, whose Julian ancestry seems to have been the decisive factor in her favor.[121]

The winner, however, did not feel secure. Lollia Paulina (probably less than thirty years old)[122] still seemed a potentially dangerous rival. Her destruction was therefore resolved upon. Information was obtained leading to a *maiestas* indictment for violation of the edict of 11 A.D. Lollia was specifically accused in the senate for having entered into forbidden consultations with astrologers, sorcerers, and the oracle of the Clarian Apollo.[123] Claudius, well-coached by Agrippina no doubt, played the sorry part of demanding in a speech her conviction by the senate. For having harbored "pernicious plans against the state" (*perniciosa in rem publicam consilia*) she should be punished, and her means to pursue such aims be taken from her.

Modern opinion tends with Tacitus to consider Lollia Paulina's indictment a fraudulent one.[124] Whatever her "plans against the state" may have been, as a woman she could not hope to obtain the crown in her own right, but only by marrying an emperor, i.e., Claudius, or a conspirator who in turn would ascend the throne. The fact that she had inquired about the imperial marriage, obviously after the sensational ceremony which joined Claudius and his niece Agrippina, can hardly be doubted. Curiosity of this kind seems definitely in keeping with a woman of Lollia's type. The law of 11 A.D. and its subsequent interpretation in the courts (for example in the trials of Aemilia Lepida, Claudia Pulchra, as well as in the

121 Tacitus, *Annals,* XII, 2ff.

122 If she married, as was customary, her first husband in her early teens, Lollia was probably less than twenty years old when Caligula married her in 38.

123 Tacitus, *Annals,* XII, 22: The accuser "obiceret Chaldaeos, magos, interrogatumque Apollinis Clarii simulacrum super nuptiis imperatoris."

124 Stein in *RE,* XIII (1926), 1394f.

earlier one of Libo Drusus) had forbidden inquiries about anyone's death and had made inquiries *de salute principis* the basis of *maiestas* indictments on more than one occasion. In Lollia's case it is probable that she consulted astrologers and other diviners on the date and circumstances, not of the emperor's, but of Agrippina's death, hoping perhaps to succeed thereafter in marrying Claudius. To inquire about the *salus* of an emperor's wife had never before been construed as sufficient evidence of the crime of *maiestas*. Agrippina, however, the first to win the formal title of empress (*Augusta*),[125] may well have been determined to make forbidden astrological and other inquiries *de salute Augustae* as much a ground for *maiestas* indictments as those *de salute principis*. Lollia's contacts with *magi* do not appear to have been for the purpose of employing black magic against her successful rival. At least the insertion of the word *magi* by Tacitus amidst the astrologers and the oracle of the Clarian Apollo pointed to diviners by magic rather than to practitioners of black magic or *venefici*. Nor did Claudius himself intimate any suspicions of this kind.

The senate obediently convicted Lollia Paulina, stripped her of all but five million sesterces and sent her into exile. This, however, did not allay Agrippina's fears. Lollia's death alone could satisfy the empress. An officer was eventually sent with the necessary instructions. As befitted a person of her rank, Lollia Paulina was to be given the privilege of committing suicide. If she refused, the officer was to kill her. With the courage of her caste Lollia went through with the then traditional rite: she did away with herself. A ghoulish aftermath was, perhaps falsely, recorded by Cassius Dio. Her dead rival's head being sent to Agrippina, the empress was not assured of its identity until, knowing of certain peculiarities of Lollia's

[125] Tacitus, *Annals*, XII, 26; Cassius Dio, *ep.* LXI (LX), 33, 2a; *CIG*, 3610. Her picture is found on coins, and in the east she too was worshipped as divine; cf. V. Scramuzza, *The Emperor Claudius* (Harvard Historical Studies, vol. XLIV), pp. 91 and 262, n. 37.

teeth, she had opened its mouth and, finding what she was looking for, was satisfied at last.[126]

The memory of Lollia Paulina remained alive, however. The day came in 59 when Agrippina's own son, the emperor Nero, signed her death warrant. To blacken her memory he then remembered her former victim: Lollia Paulina's ashes were permitted to return to Rome and enshrined in a tomb worthy of her rank.[127] Her trial ended the formative period of legal interpretation of the Augustan edict of 11 A.D. Thereafter divinatory inquiries *de salute* of the emperor and his house were treated as *maiestas per se*,[128] a legal practice persisting until the end of Roman antiquity.

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126 Cassius Dio, *ep.* LXI (LX), 32, 4.

127 Tacitus, *Annals,* XIV, 12.

128 See Paulus, *Sententiae,* V, 21, 3. Capital punishment was the penalty for inquiries about the *salus* of the ruler and about important matters of state. The latter term would of course cover inquiries about the *salus* of important members of the imperial family.

IN DUBIIS BENIGNIORA
(Dig. 50.17.56).*

IN choosing the topic of my address as Magister of the Riccobono Seminar of Roman Law in America[1] I was guided primarily by the desire to make a contribution in support of a doctrine which Professor Salvatore Riccobono has been teaching for nearly half a century. My address should, however, not only be a tribute to the greatest living authority on Roman Law, a revered friend for more than forty years, whose labors I was privileged to share, some ten years ago, in the preparation of a new edition of pre-Justinian legal sources. It may also show—at least to those who are less familiar with modern trends in the study of Roman Law—the tools of Romanistic research of today. It is self-understood that technicalities are unavoidable in a paper of this kind, but I shall try to touch upon them as rarely as possible.

The fundamental principle of modern criminal law, *in dubio pro reo,* is probably more familiar to the contemporary lawyer than the Roman maxim under discussion. *In dubio pro reo* obtains when either the guilt of the accused is not proved beyond any doubt, or when it is doubtful whether the offense committed by him is fully covered by the penal statute under which he is being made liable (not to mention other circumstances in which the rule is to be applied). In all such cases the decision should be in his favor. The Latin phrase, *in dubiis benigniora,* which I wish to examine here from a purely Romanistic angle, and the wording of which doubtless served as a model for the modern motto just mentioned, goes back to a

* A more detailed presentation of the same subject appeared in the *Atti del Congresso Internazionale di diritto romano e di storia del diritto di Verona* (Milano, Giuffrè, 1951), II, 187-205; hereafter referred to as *Atti.*

[1] Delivered on May 15, 1951, at the final meeting for the academic year 1950-51.

Roman jurist of eighteen centuries ago. In the last title of Justinian's Digest (50.17), *De diversis regulis iuris antiqui,* we read the following text excerpted from the commentary of Gaius on the praetorian Edict, of about the middle of the second century:

fr. 56: semper in dubiis benigniora praeferenda sunt.

" In doubtful matters the more benevolent (benign) solution should always be given preference." The part of Gaius' commentary from which this sentence was drawn dealt with legacies, but the specific case to which Gaius wanted the rule to be applied is not known.

The text, concise and clear as it is, should not provoke any doubts as to its authenticity, to wit, its classical origin and the authorship of Gaius. And yet, it was branded as spurious by a prominent Italian scholar whose premature death has been deeply deplored by friends, colleagues, and scholars in Roman Law. Emilio Albertario considered the text an interpolation, inserted under the name of Gaius in the Digest by the emperor's compilers, to whom this maxim, allegedly of scholastic Byzantine coinage, was particularly attractive.

The late scholar expressed this idea nearly thirty years ago [2] but repeated it several times later. All he had to object to in our six-word text was the term *benigniora,* since in his opinion the noun *benignitas* and its derivatives, the adjectives *benignus* and *benignior* and the adverbs *benigne* and *benignius,* were not used by the classical jurists: consequently, wherever they occur in juristic texts, they must be due to postclassical or to Justinian's additions. Albertario banished the word not only for linguistic reasons. His stricture was directed against the idea of *benignitas* itself, which according to him should be excluded from classical juristic thinking and attributed to postclassical, in particular to Christian influences. Others had preceded Albertario in this latter assumption, but none of his predecessors or followers was ever as radical as he. The paper

[2] *Bull. Ist. Dir. rom.,* 33 (1923), 71. See *Atti,* p. 187f.

in which he developed his idea belonged to the type of " word-monographs," very much à la mode in the second and third decades of our century. In this kind of papers, authors tried to eliminate certain words and phrases from classical juristic diction wherever they occurred, if it could be proved or merely made probable only in a few instances that they were interpolated. It is obvious that by such a method, guided primarily by linguistic considerations, many texts became victims of the destructive tools of a purely philological criticism. And this was the fate of *benignitas,* too. Surely no serious scholar would deny nowadays that *benignitas* and its twin creation, *humanitas,* are frequently interpolated in Justinian's legislation. But banishing it from all texts is a gross methodological mistake and a dangerous undertaking which in the last analysis leads to untenable results, as we shall see in the case of the text under discussion.

It must be stressed in the first place that *benignitas* and its derivatives occur very often in Latin literature of all times and in all kinds of writings besides the works of jurists. Modern scholars who consider the term as of Byzantine coinage as far as its occurrence in juristic writings is concerned, have tried to justify their opinion by the remark that the language of the Roman jurists differed entirely from that of the historians and orators, and that therefore the occurrence of some words or locutions in literary works does not prove anything for the usage of the jurists. Now, we all know that the lawyer's language has always been, and still is, a professional one. It was so with the Romans and it is so nowadays that the professional language of the jurist has its peculiarities—which, to be frank, not always make for its beauty. However, it is an untenable approach first to assert apodictically and without any evidence that a Roman jurist " could not have used " this or that word (how can it be proved at all that the jurists did *not* use a specific word or locution?), and then simply to eliminate the incriminated terms from the juristic writings as preserved in the Digest, although the same terms were used by Cicero as well as

others—historians, philosophers, rhetoricians, and even playwrights. The Roman jurists had no special dictionary which listed the words they might or might not use. Why could not a jurist use a word which as a student of rhetoric he had heard from his teacher in the classroom? [3] The term *benignitas* belongs to the rhetoricians' stock—a glance in the *Thesaurus Linguae Latinae* may suffice for Quintilian, Seneca, and others—and therefore there is no reason at all to banish it *a priori* from classical juristic texts.

Once we have freed the *benigniora* in our text from any linguistic suspicion, the remaining five words do not admit of any attack from the same quarters. *In dubiis,* i.e., *in dubiis rebus,* is a good classical locution, like *in ambiguis, in obscuris;* it refers to doubtful legal situations, to cases in which doubts arise about the meaning of written or spoken words, and so on. *Semper* is among the most frequent words in classical texts since it serves to stress the general and constant validity of a legal norm. In the very title 50.17 of the Digest, concerned with legal rules of the ancient law, *semper* occurs several times in a connection similar to that of the text of Gaius. The Byzantines preferred less decisive terms, such as *plerumque, interdum, nonnumquam* (sometimes, now and then), for the Byzantine mind in general was anxious to avoid apodictic formulae which left no door open for exceptions. We find these terms in numerous texts, interpolated beyond any doubt, where they were inserted to weaken the rigid classical rule and to facilitate exceptions thereto.

The proof of the authenticity of an allegedly interpolated text cannot, however, stop at the examination of its external, linguistic aspect. More important is its content since interpolations may exist where linguistic criteria are missing.

Our text, *semper in dubiis benigniora praeferenda sunt,* evidently sounds incomplete since it does not say in favor of

[3] For further discussion see *Atti,* p. 189. No new convincing arguments to the contrary are found in the posthumous article by Beseler, *Festschrift Schulz,* I (1951), 33, n. 1.

whom, and with regard to what, the decision should be more benevolent. However, this we may easily infer from the place from which the text was taken. It was mentioned before that the passage originally dealt with legacies. It contained a rule of interpretation to be applied in cases in which either the validity or the content of the legacy, or the appointment of the legatee was somewhat doubtful. The " benignity " could only regard the legatee and the validity of the legacy, since the will of the testator was beyond any doubt concentrated on the legatee who was to benefit from the pertinent testamentary disposition. The heir does not enter into consideration for the benignity, inasmuch as he is the person whom the testator wanted to charge with the legacy *at any rate*. The doubts might arise for various reasons. For instance, the testator may have used ambiguous, or not quite precise, words with regard either to the person of the legatee or to the object bequeathed. A doubtful situation might also arise from the attitude of the heir who, according to the earlier classical law, made the whole testament void by refusing to accept the inheritance. The purpose and meaning of Gaius' saying was to find a solution which would save the validity of the legacy and protect the legatee if the doubts concerned his identity. Gaius wanted to give a directive to the jurists—magistrates and judges, practitioners and theoreticians—as to what line they had preferably to follow in similar cases. Under all circumstances, however, the case had to be dubious: if in the existing law there was already a rule which settled the specific case at issue, no dubiousness at all remained, and Gaius' rule could not come into play.

When we consider that, as early as the age of Hadrian, the jurist Celsus defined the law as *ars boni et aequi* (a definition to which Professor Riccobono devoted several highly illuminating papers), then it is not at all surprising or unusual that a jurist of the next generation, Gaius, should have coined the rule *in dubiis benigniora*.

The classical origin of the principle appears fully confirmed by a sentence of another prominent jurist. Marcellus, who

was Gaius' younger contemporary, expressed in D. 28.4.3 pr. (from book 29 of his *Digesta*) the same idea, though in slightly different words: "In re dubia benigniorem interpretationem sequi non minus iustius est quam tutius" (It is not less just than safe to follow in an ambiguous matter the more benign interpretation). The text from which this sentence is quoted is extremely instructive. Marcellus reports a discussion which took place before the Emperor Marcus Aurelius in the following case. A testator crossed out in his testament the names of the heirs instituted therein but left the legacies and the manumissions of slaves untouched. The representative of the fisc claimed the estate, arguing—not without reason—that a testament in which there is no appointment of an heir is void. On the other hand, the lawyer of the legatees pointed out that the testator had annulled only the appointment of the heirs but not canceled the manumissions and legacies. After a dramatic exchange of opinions the emperor decided: "The present case deserves a more humane interpretation (*humanior interpretatio*) to the effect that we should assume the testator wanted to annul only the appointment of the heirs." In connection with this case Marcellus made the remark quoted above. Again we have the *res dubia,* again the *benignior interpretatio* (which is synonymous with the emperor's *humanior interpretatio*), and again the cautious form of the advice: *non minus iustius est quam tutius.* The full concordance of the emperor's decision with the jurist's opinion is so striking that to me it seems needless to adduce further proof for the authenticity of the two passages written by two contemporary jurists.

But there is even more. The authenticity of Marcellus' saying receives support not only from Gaius, but also from the fact that it is literally repeated in the title *De regulis iuris,* D. 50.17.192.1. This did not prevent the extreme critics from asserting that Marcellus' formula was a Byzantine product.[4] One of them did not even mention that the passage was twice preserved in the Digest. All that has been objected to it, with

[4] Cf. *Atti,* p. 194.

the evident purpose of discrediting the *benignior* and *humanior interpretatio,* was of a linguistic nature and without any decisive value whatsoever. As a matter of fact, Marcellus' rule, stigmatized—one does not know why—as a scholastic, postclassical maxim, is in perfect accordance with Marcus Aurelius' decision. What the *humanior interpretatio* was for the latter, was to Marcellus the *benignior interpretatio.* Let us not forget that Marcellus was a member of Marcus Aurelius' advisory council (*consilium*). In all likelihood it was our jurist himself who suggested to the emperor the more humane decision. The exact record of the altercation in the emperor's court—a very rare case in the Digest—allows us to assume that Marcellus attended the trial as the emperor's counselor. Moreover, the same Marcellus had recommended the principle of *benigna interpretatio* in an earlier book (11) of his *Digesta* when in a testament *ambigue aut etiam perperam scriptum est.*[5]

The text in D. 28.4.3 pr. is one of the strongest proofs for the identification of *humanitas* and *benignitas* as early as the times of the classical jurisprudence. Whoever accepts *humanior interpretatio* in the mouth of Marcus Aurelius as genuine, must perforce admit the authenticity of *benignior interpretatio* in the pertinent remarks of the emperor's legal adviser. It is also evident that these considerations vindicate beyond doubt the classical origin of *humanitas,* a concept which in modern Romanistic literature has been branded as a postclassical invention, so much so that a prominent scholar [6] did not hesitate to speak of the "stets byzantinische *humanior interpretatio.*"

The circumstance that both Gaius and Marcellus formulated the rule of benign interpretation with reference to legacies is a further welcome support for our thesis of its classical origin.

The repetition of Marcellus' saying in the final title of the Digest calls for some remarks. We have here an instance of

[5] D. 34.5.24. Through a regrettable inadvertence the remarks on Marcellus are missing in my Italian paper (*Atti,* p. 195).

[6] Pringsheim, *Ztschr. Sav. Stift.,* 42 (1921), 661.

so-called *leges geminatae,* i.e., of identical passages preserved twice under the name of the same jurist and excerpted from the same work of his. To be sure, *leges geminatae* must not always be authentic. Although, generally speaking, two identical texts are more reliable than a text preserved only once, the possibility remains that the compilers might have repeated in one text what they had already said in another. A duplication has, however, a particular significance if one of the twin texts is found in the concluding title of the Digest, *De regulis iuris.* In such an instance—and this is the case of Marcellus' text—the assumption that the compilers had copied themselves is hardly admissible. The last title of the Digest bears the superscription: "On various rules of the ancient law" (*iuris antiqui*). It would have been a forgery of the worst kind if the compilers had repeated in this title, under the flag of "ancient law," a legal rule which they had created and interpolated themselves in a previous part of the Digest. To call this a rule of ancient law, to present it under the name of a classical jurist, and to cover it with the title of a classical work would have been a falsification going far beyond the authority the compilers had received from Justinian. This case is different from the many thousands of interpolations through which they made a classical jurist say what he never had said, because the contents of the final title of the Digest were vouchsafed by a solemn assertion of Justinian himself, in the constitution by which he promulgated the Digest (*Tanta,* c. 8c). There, in a special phrase devoted to the title *De regulis iuris,* the emperor explicitly stated that what was collected therein *a veteribus inventa sunt.* Strangely enough, this point has never been stressed thus far by modern scholars in examining the rules of D. 50.17 as to their authenticity.

By way of recapitulation—now that the circle is closed—we may say: we have in D. 50.17 two texts, fr. 56 and fr. 192.1, which unmistakably promote the *benigniora* or the *benignior interpretatio* in dubious matters. Moreover, one of the two texts is literally preserved a second time in the middle of the

Digest. Whatever has been said against the authenticity of the rule started from the preconceived and erroneous idea that the concept of *benignitas* was unknown to classical jurists. In view of the texts mentioned none of these arguments can hold.

It may perhaps be asked how it happened that the same rule was put twice in the title *De regulis iuris,* and one of them, that of Marcellus, even twice in the Digest as a whole, despite the strict order of Justinian to the effect that repetitions—he even put it stronger, *similitudines* (similarities)—be avoided. To me the answer in this specific case seems none too difficult, and we do not even have to fall back on the inadvertence of the compilers, which in most other cases of duplication is the only excuse. The repetition of Marcellus' maxim might have been caused by the fact that it had been expressed at its first occurrence in a very extensive text (D. 28.4.3 pr.), in which the jurist not only gave a report on the trial before Marcus Aurelius but also depicted the controversial nature of the whole problèm. The text has no less than thirty-three lines in the "stereotype" edition of the Digest of Mommsen-Krueger. Being aware of the importance of the rule, the compilers repeated the twelve-word sentence in the final title.

For the other question, as to how it happened that two legal rules expressing the same principle were inserted in the same title 50.17, I wish to propose the following solution. Although the technique applied in the compilation of the Digest is still obscure in many points, it is generally assumed—according to an ingenious theory presented some 130 years ago by Bluhme —that the compilers worked in three subcommittees, each of which excerpted a considerable stock of juristic writings, the so-called "masses." It was precisely the order of the fragments in the final title which revealed to modern scholars the existence of four distinct masses and served as the basic argument for that theory. Since the composition of the comprehensive title *De diversis regulis iuris* was planned from the beginning, it seems likely to me that each subcommittee contributed the legal rules which because of their importance were

to be inserted therein. Thus the text by Gaius entered in the first group (the so-called Sabinian mass) as fr. 56, while Marcellus' text was contributed by the third subcommittee (responsible for the so-called Papinian mass) as fr. 192.

Thus the two texts, both definitely classical, complement each other owing to their slightly different wording. Gaius says that *benigniora* are preferable, Marcellus says that a *benignior interpretatio* is not less just than safe. The two formulae, not identical in wording, could easily obtain their place in the same title without provoking a reproach of inadvertence to the address of the compilers. It is characteristic that neither of the two jurists formulated the principle as an absolute, apodictic command. Both offered it as a line of interpretation to be observed with preference to any other, provided that the situation evokes some doubts (*in dubiis*).

Gaius and Marcellus were by no means the only representatives of the idea of *benignitas* and *benignior interpretatio*. The *humanior interpretatio,* on which Marcus Aurelius based his decision, was not his invention. Before him the Emperor Hadrian used the same expression in a rescript addressed to the prefect of Egypt. The rescript, which so far has not been discussed in connection with our problem, is preserved in a papyrus (now in Berlin, *B.G.U.* I, 140), in a literal Greek translation from the Latin original, as the text itself points out. It is concerned with the admission to intestate inheritance of soldiers' children who were born during their father's military service. According to the earlier law such children did not inherit their father's property since they were not born in a valid matrimony, soldiers being unable legally to conclude a marriage. In introducing his reform, Hadrian used the words φιλανθρωπότερον ἑρμηνεύειν, which are an exact Greek version of the Latin *humanius interpretari*.[7] The papyrus has escaped the

[7] In schol. 10 ad *Bas.* 48.4.41.10 (Heimb. IV, 678) φιλάνθρωπος ἑρμηνεία is used for *humana interpretatio* in D. 40.5.41.10. *Benigniora* in Gaius' text is translated in *Bas.* 2.3.56 by τὸ φιλάνθρωπον. On the other hand, *humana interpretatio* in D. 38.17.1.6 appears in schol. 7 ad *Bas.* 45.1.27 (Heimb. IV, 486) as φιλαγάθως, which elsewhere is used for *benignus;* cf. schol. 7 ad *Bas.* 48.5.4 (Heimb. IV, 692) and D. 40.7.3.14.

attention of modern scholars; otherwise they would have abstained from speaking of the Byzantine character of the *humanior interpretatio.* This whole conception breaks down under the evidence of the papyrus. And we may add that there is no reason why an expression used by two emperors, possibly at the suggestion of their legal advisers, could not be applied by a jurist in his writing.

We have, moreover, further utterances by jurists which are inspired by the same idea as Gaius' *benigniora,* although the term *benignitas* does not appear in these texts. I shall mention only a few of them.[8] Already the great Julian, a predecessor of Gaius, recommended for the field of civil procedure what follows: "Quotiens in actionibus aut in exceptionibus ambigua oratio est, commodissimum est id accipi quo res de qua agitur magis valeat quam pereat" (D. 34.5.12: Whenever there is an ambiguous diction in an action or exception, it is most proper [suitable] that the matter which is the object of the litigation be saved rather than annulled). One or the other word may perhaps not be authentic, but the idea itself is guided by the same tendency as Gaius' *benigniora.* Gaius himself recommended in a saying—again preserved in D. 50.17—that the defendants in a civil suit be treated with more benevolence than the plaintiffs: "favorabiliores rei potius quam actores habentur" (D. 50.17.125). This Gaian advice for the field of procedure, prompted by his idea of *benigniora,* certainly applied only where some doubts occurred. The rule would never lead to an unjust decision in favor of the defendant where it was the plaintiff who deserved protection. In particular, the use of an ambiguous term by the plaintiff was not to give an opportunity for interpreting it in favor of the defendant. Hence another rule, expressed by Paul in D. 50.17.172.1, stated that a claim ambiguously formulated by the plaintiff should be understood in a way that the matter be saved for him: "ambigua autem intentio ita accipienda est, ut res salva actori sit."

[8] For a detailed analysis of the pertinent texts and their defense against suspicion of interpolation see *Atti,* pp. 202ff.

The same Paul followed Gaius' and Marcellus' line in another field. In dubious matters (*in dubiis*) efforts should always be made to the effect that a matter contracted in good faith be saved: "semper in dubiis id agendum est, ut quam tutissimo loco sit res bona fide contracta" (D. 34.5.21.1). *In tutissimo loco* recalls the *tutius* in Marcellus' text. Here the benevolent treatment is recommended with regard to agreements concluded in good faith.

For the law of dowries it is again Paul who gives an advice how to deal with doubtful situations. "In ambiguis pro dotibus respondere melius est" (D. 23.3.70). The rule applied when, e.g., it was doubtful whether a thing belonged to a dowry or not. In such a situation, Paul says, it is more appropriate to deliver an affirmative opinion, i.e., to conclude that the thing was among those constituted as a dowry, in order to save it for the wife. The term *respondere* speaks in favor of the classical origin of the text, since a Byzantine jurist would never have referred to this characteristic function of the classical jurists. The rule is repeated among the *regulae iuris antiqui* in D. 50.17.85, like the one by Marcellus. Yet it has not been branded as interpolated (although all other texts mentioned above have been stigmatized as such) in spite of the *melius est,* which is a generally recognized criterion of interpolation. The rule fits perfectly with the conception of *benigniora; in ambiguis* is synonymous with *in dubiis,* and *melius est* is equal to *praeferenda sunt.*

The principle of *benignitas* found entrance also into the domain of criminal law. Let us mention only two among the more characteristic passages. To Paul again we owe the following *regula iuris* (D. 50.17.155): "in poenalibus causis benignius interpretandum est," of course in favor of the accused. It is clear that the rule applies only in cases in which there is a choice between two interpretations, although the additional clause *in dubiis* is missing. Another text, by the latest of the classical jurists, Hermogenianus, recommends the principle: "Interpretatione legum poenae molliendae sunt potius quam

asperandae" (D. 48.19.42). These are the antecedents of the maxim *in dubio pro reo* and similar ones (*in dubio mitius*) which characterize the criminal law of modern civilized peoples. It is symptomatic that the modern critics of Roman legal texts left these two sayings unsuspected. It was only the field of the classical private law from which they wanted to banish the *benignitas*.

A few words are in order concerning the attitude of Justinian and his collaborators toward *benignitas* in his own legal system. By transferring the rules dealing with benevolent interpretation to the last title of the Digest, the compilers disconnected them from the cases to which they originally applied and thus raised them into general rules. In the writings of Gaius and Marcellus the maxims referred to the law of successions, in particular to specific testamentary dispositions concerning legacies and manumissions of slaves. I believe that this might have been the origin of the entrance of *benignitas* in the field of private law. Hadrian's *humanius interpretari* belonged to the same field, although the emperor's intention was to honor the children of soldiers who died in the service. Later, but still in classical times, the idea of *benignitas* spread to other provinces of the Roman law. In postclassical legislation and in Justinian's law the rule *in dubiis benigniora* found a fertile soil. The Christian emperors accepted the rule and gave it a larger domain of application, since conceptions such as *benignitas* and *humanitas*,[9] as well as the related terms *pietas* and *caritas*, were familiar to Christian thought. This explains various interpolations in texts which doubtless bear traces of Byzantine reworking. Justinian himself showed how much he had learned from the classical jurists in an enactment of 530 A.D. (C. 7.4.14.1). In this case a testator had freed in his testament the as yet unborn child of a slave woman, who

[9] Recently, two very instructive studies on *humanitas* have been published: Maschi, "Humanitas come motivo giuridico," *Annali Triestini* 18 (1948, published 1949), pp. 102 (reprint), and S. Riccobono Jr., "Humanitas," *Circolo Giuridico*, 1950 (Palermo), pp. 24 (reprint). Further bibliographical indications in Maschi, n. 25, and in Riccobono, n. 1.

afterwards gave birth to twins. The emperor decided that both children are free, because "in ambiguis sensibus melius est . . . . humaniorem amplecti sententiam." It is precisely this text which led some modern scholars astray and made them believe that wherever the term *benignitas* occurs, it is Byzantine, of postclassical or of Justinian's creation. But in view of the pronouncements of Hadrian and Marcus Aurelius this opinion loses its basis and must be rejected as grossly exaggerated.

In conclusion, I wish to state that the way for *benignitas* was paved in the classical law about the middle of the second Christian century. A concept which seemed good and just to the Emperors Hadrian and Marcus Aurelius and might have been suggested to them by their legal advisers could not be neglected by the contemporary and the later jurists in their opinions and writings. The term and the idea of *benignitas* cannot be expelled from either language or thought of the classical jurists. Perhaps *benignitas* and its derivatives can be saved even in a few more texts, now commonly considered as interpolated, once the discussion is freed from preconceived philological notions and the phantom of the "always Byzantine" *benignior* (*humanior*) *interpretatio*. Nor should emotional phrases such as "the *benignitas* triumphant over juristic logic" [10] becloud a solid criticism of the pertinent texts. As we have seen, the principle applied only *in dubiis*, i.e., precisely in situations where juristic logic failed to offer a solution.

A method not encumbered with these and similar exaggerations is—to speak with Marcellus—*non minus iustius quam tutius*. After what has been said in the foregoing pages it is certainly not too much to add that also in the study of interpolations one of the leading rules should be: *in dubiis benigniora*. In doubtful cases let us stand for the authenticity of the text under suspicion.

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[10] Beseler, *Beiträge*, 4 (1920), 35: "*die über die Rechtslogik triumphierende Benignität.*"

STRUCTURAL DIFFERENCES BETWEEN COMMON AND CIVIL LAW*

LATELY, a German lawyer, a judge at an appellate court and a lecturer at one of the outstanding German Law Schools who had spent six months in this country on invitation by our State Department wrote an interesting report on his experiences. He opened his chapter on the legal field with the following summary: "The gap between American and German jurisdiction can be said to be as large and boundless as the ocean separating America from the European continent." That sounds hopeless indeed. It shall be considered at a later moment whether such a statement in its generality is well founded.

Particular Difficulties Encountered in Comparative Work Involving Common and Civil Law

One fact, however, is indisputable. Whenever actual comparative work of a scholarly or practical character involving Common and Civil Law is undertaken, one meets with extraordinary, rather discouraging difficulties. It may seem almost impossible to decide even on a short, logically correct title for a comparative study in a restricted, particular field. To give an example: how could one appropriately entitle a paper comparing the solutions given by Common and by Civil Law to the problem, present everywhere under conditions of modern life, that a person must be able to transact with direct legal effect through another person? Of course, to the commoner the answer is "Agency," and the civilian might think of "Representation." But is this really correct? Does not

* This article is a slightly expanded version of a paper read at the meeting of the Riccobono Seminar of Roman Law in America on April 27, 1951. Mr. Craig, J.U.D., M.C.L., Diplomé ès Droit (Sorbonne), is a Member of the Bar of the District of Columbia.

agency include at least two features unconnected with representation? One, completely unknown to Civil Law, is the doctrine of the undisclosed principal, and another, the doctrine of vicarious liability, is in civilian thinking definitely disconnected from and incoherent with "representation" and considered as part of delictual or quasi-delictual obligations. Not to mention the inclusion of parts of partnership or corporation law or the law of workmen's compensation within the topic of agency, which lately has been undertaken, apparently because of a logical misunderstanding.[1] And does agency, on the other hand, really cover, even nowadays, the whole problem? Do not the institutions of trust—used for the protection of incapable persons without even the idea of "representation"—and of estoppel play an important role as well? And, from the Civil Law side, the use of the expression "representation" (or any other English translation of the corresponding term used in the legal vernacular of the country concerned) appears to be unsatisfactory, too. Even to the civilian its actual meaning may be doubtful. It might be understood in a very broad or in a specific sense, and its meaning in the different languages is not completely the same. And no other term—not "procuration" and clearly not "mandate"[2]—would prove more adequate. Nor would it be of much help to restrict the term by adding the specification, "in legal transactions." For this may be, perhaps, an adequate translation for the French *acte juridique* or the German *Rechtsgeschäft,*

[1] Cf. Conrad, "What's Wrong with Agency," *Journal of Legal Education* 1 (1948-9) 540, on the development of agency as a proper basic and comprehensive topic in the teaching of Common Law. From his presentation it appears that the inclusion of these fields was caused by the observation that rules of agency, or even the general ideas ("central themes") behind them, play an important role within those fields. This seems to indicate that the real nature of agency as a mere incidental element—a modality which, like condition or time, might be connected with any contract or legal transaction—has not yet been fully understood.

[2] For some reasons for this statement cf. Schlesinger, *Comparative Law, Cases and Materials* (1950) 386ff., 387.

but it certainly is not a concept of Common Law.[3] So the only way out would probably consist in going back to the underlying factual situation as it has been undertaken above in bringing up the problem.

Similar obstacles are encountered in every practical legal activity involving foreign, Civil Law contacts—whether it may mean mere translating of legal documents, or drafting of agreements, or discussion, oral or by letter, of legal matters; or forensic practice in deciding the case as a judge, handling it as an attorney of a party or, particularly, in giving testimony on foreign law as an expert witness. The expert, called to explain the foreign law, feels very often at a loss already in his attempt to explain the most fundamental notions and rules to the court in its language and by the use of concepts familiar to it. The customary dictionaries to which he may turn for help are of no avail. The way he is examined by the examining attorney does certainly not alleviate his task; for he will not be allowed to digress, in order to lay a foundation for an understanding, from the attorney's questions, which are based, of course, on sometimes completely different notions and concepts. Thus the expert witness, in all probability, will leave the courtroom with a deep feeling of frustration, and in reading over the transcript of his testimony, probably made even more confusing by mistakes and misunderstandings of foreign expressions, he will remain utterly dissatisfied with the results.[4]

[3] See Pound, "A Comparison of Systems of Law," *University of Pittsburgh Law Review* 10 (1949) 271-283, esp. 275-6. For definitions and bibliography see the recent article by Lobingier, "Juristic Acts in the Civil Law," *Tulane L. Rev.* 24 (1949) 178, Introductory.

[4] Cf. Wood & Selick, Inc. *v.* Compagnie Générale Transatlantique, 43 F. 2d 941, where J. L. Hand stated: "The testimony of the expert was exceedingly confusing, not due to any fault of his, but inevitable because of his attempt to import into the French law the refined notion which pervades our own, of a right barred of remedy, but still existing in nubibus . . . . The embarassment is . . . that we have to interpret another system of law according to notions wholly foreign to it." Reprinted in Schlesinger (n. 2 *supra*) 84ff. In fact, the notion of a right barred of remedy is well known and developed in Roman and Civil Law.

These difficulties do not, or at least to a much minor degree, exist when the law of different Common Law jurisdictions or of different countries adhering to modern Civil Law come into contact. Here the lawyers feel on common ground, they speak the same legal language and the relevant actual rules are easily understood. Here difficulties which arise are readily discovered, discussed, and straightened out in spite of the fact that the actual details of law are by no means identical in different jurisdictions of Common Law, and even less so in different countries belonging to the orbit of Civil Law. Therefore, obviously fundamental differences must exist between the systems of Common and of Civil Law which account for this experience.

Differences in the Structure of Common and of Civil Law, the Most Fundamental Distinguishing Characteristic

Many distinguishing characteristics have been stressed which may be roughly linked together under the heading of "differences with regard to the sources of law and their use and relative importance." Judge-made case law versus written law; so called customary law versus statutory, mostly codified law; rule of *stare decisis* versus independence from precedents, are some of them. Other points which have been emphasized as important regard the administration of the law. They include the supposedly administrative character of Civil Law and the judicial character of Common Law; the respective influence and authority of courts, universities, writers, lawyers; in particular the unique, completely independent position of the Common Law judge; the specific methods and techniques used in the application and interpretation of legal rules; the organization of justice, and procedural differences.[5]

[5] For a masterly, short but comprehensive presentation see Pound's article, *supra* n. 3. Cf. also Pound, "The Future of American Law," *Seminar* 4 (1946) 1; *id., The History and System of the American Law* (1939) 14ff., 68ff., 73, 81-83, 93, 130, 172; *The Administration of Justice,* Three Lectures (1947); and the articles by Rheinstein, "Common Law and Civil Law, a Comparison,"

All these criteria, although sometimes exaggerated, and sometimes based on oversimplification, are definitely relevant and interesting, if correctly understood. They are obviously interrelated and interlocked by their immanent nature, even though it may prove at times difficult to reason out their true relationship under the logical category of cause and effect.

However, the fundamental difference, more important than any of the features just mentioned, exists in the structure of the two bodies of law. It is the profound diversity of the elementary notions and concepts and of their arrangement that causes, and accounts for, the great difficulties in mutual understanding and in comparative studies and research.[6]

The point has been summarized by stating that Civil Law is "systematized" law and Common Law is not, or at least not to the same high degree, or in a less logical way. But such a broad formula cannot tell the whole story. For a true understanding of the existing situation it becomes necessary to delve a little deeper, to find out what is meant by a "system" of law in the appropriate sense, to analyze its constituent elements and essential features, and then to examine their nature in the two bodies of law.

The Idea of a Legal System; Its Elements and Its Organization

Any portrayal provoking the idea that Common Law is not a systematized law at all is misleading and erroneous. No body of an advanced law is imaginable without some systema-

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Pennsylvania Bar Assn. Quarterly 12 (1941-2) 7-19, and Parker, "The Criteria of the Civil Law," *The Jurist* 7 (1947) 140-170. A concise, critical presentation of the characteristics generally discussed is given by David, *Traité élémentaire de droit civil comparé* (1950) 270-280.

[6] Its fundamental importance, obvious to any one engaged in comparative work involving both legal systems, seems first to have been stressed in theory by Ascarelli, "La funzione del diritto comparato e il nostro sistema di diritto privato," *Annali del Seminario giuridico dell'Università di Catania* 3 (1949). It has been fully discussed and historically explained by David, *op. cit.* (n. 5) 281-295, and earlier in his *Introduction à l'étude du droit privé de l'Angleterre* (1948; in collaboration with Gutteridge and Wortley) pt. II, ch. VI: "Structure et esprit du droit anglais," pp. 200ff.

tization. In the last analysis a system of law consists of innumerable fixed legal rules which apply to countless different factual situations changing from day to day. The human mind, as it is organized by nature, would be unable to remember and to deal with this mass of rules and principles without establishing certain relations among them and among the underlying factual situations, thereby bringing order into their abundance. The means used for their more effective presentation and their better apprehensibility is that basic element of legal thought, the subsumption of factual situations, and of the legal rules applicable to them, under legal concepts. These concepts constitute the elementary units of any legal system. Without them, all the multiple rules of law would exist as just as many independent units, unsuitable for reconciliation in the absence of more general principles to control them. Without them, law could not be presented as a coherent whole, as a "system," and it certainly could not claim to be the object of a science. Just one example: we use the notions of property and ownership as if they were a really original, primary concept. But, in fact, all the elements they include, "the entirety of the powers of use and disposal allowed by law" [7]—the "habere possidere, uti, frui, licere", as the old Roman lawyers described their principal content [8]—were merged into them in a long historical development.

This technique of subsumption is carried further. In accordance with the innate craving of the human mind for unity and with its need for thinking in categories, each concept, once gained, has a natural trend to rise to broader concepts by the grouping together of a number of primary concepts. They might be spoken of as "legal institutions," though it might be hard to draw in theory a definite boundary line. And those legal institutions may be further unified under broader topics and higher sections and divisions and branches of law, as it is accomplished in the usual organization of codes and, beyond

[7] Pollock, *First Book of Jurisprudence* (1929) 179.

[8] See F. Schulz, *Classical Roman Law* (1951) 339, 341.

them, in civilian jurisprudence as a whole. An idea of such an organized systematic arrangement can best be gained by examining the table of contents or the synopsis of any of the Civil Law codes. These tables form part of the official texts and—though far from being set up completely alike in different countries—use very much the same notions, topics and headings. So, for example, one will find the fourth Book of the German Civil Code under the heading " Family Rights," split up into the three divisions of civil marriage, relationship, and guardianship, each of them subdivided into several titles. The rules on dissolution of marriages would, for instance, be contained within the seventh title of the first division. In the French Civil Code, " marriages " is the heading of the fifth title of Book I, " Of Persons," which includes titles also on other family relationships which we would treat under Domestic Relations. However, " divorce " forms here a separate title, too, on the same level as marriage, and it is not subsumed under the latter.

Divergence of Concepts and Higher Categories in Common and Civil Law

Common Law, like every legal system, is founded upon such legal concepts in which legal rules are arranged and brought into harmony. But the concepts and institutions of Common Law are not the same as those used, fairly identically, by civilians. And the grouping of concepts into institutions and into still broader legal sections and divisions is not undertaken in the same way nor to the same extent nor in the same elaborate manner as it is in Civil Law. They differ individually with regard to their specific content and meaning; they differ generally with regard to their character, as a result of the different methods used in coining them. Civil Law jurisprudence follows, and has followed for centuries, abstract logical categories; it strives for arriving at broad, general, clearly defined and logically interrelated concepts and homogeneous institutions, to be applied to as many similar factual situations

as possible by way of interpretation and subsumption. The notions of Common Law, on the other hand, are conceived in a concrete practical manner within the frame of an actual case, for which, before all, the most appropriate and just solution must be found. The door must be left open for further development and distinction of details. Abstract logic and generalization are not of first concern. And these concepts are, and were historically, classified with regard to their natural, actual connection in daily life and practice, which may seem merely casual and formal to the civilian.

Even the most elementary concepts that might appear to the lawyer as part of the groundwork of his own, and even of any system of law, are not alike in fact, or seem not to exist at all in the other system, or seem there to be only of very limited importance. For instance, the concepts of Common Law in its strict meaning as opposed to statute and equity; the concepts of real and personal property, of trespass, sealed contracts, consideration, Habeas Corpus, and contempt; or the notion of equity and most of the equitable concepts such as specific performance, estoppel, trust—to cite at random just a few—sound as strange and meaningless to the civilian as do to the commoner the fundamental concepts of "legal transaction" or "jural act" (to venture a translation of the French *acte juridique* or the German *Rechtsgeschäft*) and of "declaration of intent or purpose" (*déclaration de la volonté* or *Willenserklärung*); or the concept of *mora* (delay, default, neglect) as a developed legal institution; of land and movables, of the original duty to perform in nature as the primary remedial right in contract and tort obligations, the institution of succession by necessity, and many, many others.

One need only recall the fundamental divergence of almost all controlling concepts within the law of real property (or, from the civilian's standpoint, of immovable things, particularly land), which is due to the fact that the Common Law of real property is an archaic law and has not yet overcome completely the peculiarities of its medieval, feudal origins.

It is therefore bound up with antiquated concepts. The feudal ideas of tenure, estate, and seisin, the concept of future rights as reversion and remainder, had already fixed the direction of development in this part of law when, three centuries ago, fee simple became tantamount in fact to absolute ownership. Even modern statutory legislation left enough to contradict the clear Roman notions of possession, of *dominium,* and of limited rights over the property of some one else (*jura in re aliena*).[9]

Two marked, specific tendencies may be cited which seem to be influential on a more general scale in the molding of divergent particular concepts in Common Law. First, the commoner seems to be inclined to consider legal rules under the aspect of an existing relationship to which they refer, rather than under the aspect of the legal transaction, mostly a contract, of the parties concerned from which they are derived. In Civil Law, on the other hand, the will of the parties is the central point, from which consequences are deduced and which remains controlling—and this is in practice the most important consequence—even though it has not been expressed clearly or explicitly by the parties at all, but must be found by means of interpreting their declaration of "intent." The "juristic act" of the parties is the significant legal concept, and its interpretation is the basis for decision. In Common Law the central point is the typified relation. Once the relation is established, all its prearranged consequences regarding duties and rights of the parties apply as mere incidents by operation of law. Not what the parties intended, not the logical implications of their underlying agreement is considered, but rather what is customary, fair and reasonable in such a relation; and this may very well not coincide with the actual intent of the parties in the given case. Our phraseology is indicative. We speak of Vendor and Purchaser, Landlord and Tenant, Master and Servant, Principal and Surety, Principal and Agent, Husband and Wife, etc., and where a definition is

[9] *Pound* (n. 3 *supra*) 278ff.

given it usually starts out with the words, Agency (or whatever) "is a relationship whereby . . ." etc. Of course, here again we have an outgrowth of the feudal society organized by relationships, which prevailed in the times of the formation of Common Law. The spirit of subordination inherent in the lord-and-man relation may still be felt alive in such institutions.

Secondly, to Civil Law the pivot on which legal thought rests and turns is the "right," the "subjective" right. It is defined and determined as to its conditions and contents, and it seems self-evident that the courts must intervene for its enforcement, whatever its content may be, in case of violation. But this highly abstract notion of the subjective right is the product of a long historical development. Earlier law starts from the idea of a certain limited number of different actions, which are the primary reality. Only situations or facts which can be subsumed under the specific prerequisites of a specific action may result in a law suit. To prove that the action applies to the given circumstances, that these can be brought under the "formula" of Roman Law or the "writ" of Common Law, is the essential point. Analogy is the appropriate means. Consequently, legal problems and principles are considered as merely procedural ones. They have no other practical meaning. The action contains not only the form of the right but the right itself. Lawyers of old thought in terms rather of actions than of rights; "substantive law grew out of and around procedure"; [10] remedies preceded rights. Our modernized procedure has, rather late, done away with and "buried" those old actions. But they were the deciding factor during the formative era of our law, which has never been completely adapted to modern theory, and, as Maitland has put it, they still "rule us from their graves".[10a]

[10] Pound, *ibid.* 274.

[10a] *The Forms of Actions at Common Law* (1936; first ed. with Maitland's *Equity*, 1909) 2.

However, not only the fundamental concepts but the higher categories as well, into which those concepts are arranged, are not the same at all in Civil and Common Law. The legal institutions and broader divisions of law are widely different. They do correspond only in a highly imperfect and unsatisfactory way. Numerous categories of one system are absent completely from the other one. Again, certain categories exist, or seem to exist, in both systems, but the impression is deceptive. Dispersions of logically connected concepts occur; inversely, distinct concepts and questions are linked together in the same institution or under the same topic. The concept of obligation, for instance, recently seems to be used more and more by our lawyers, but obviously as a somewhat artificial, theoretical construction based on civil law ideas, rather than as an actual and natural outgrowth of Common Law development. In fact, Common Law developed—remarkably late—the notions of consensual contract, of tort, and finally even of quasi-contract as a general concept; but the concept of obligation as the higher genus including all three of them had been lost for centuries in Common Law and had been replaced by the idea of the chose in action, of which "debt" was the prototype. The chose in action, on principle, was tantamount to an object of personal property, probably so as a result of the inclination of Common Law jurists to stress the objective aspect of a relationship—namely, the fact that in the last run they refer to and deal with property—rather than the subjective aspect of a personal bond between persons. The latter idea was familiar to Roman Law.[11] The same feature is noticeable in other peculiarities of the Common Law, as for instance in the doctrine of the undisclosed principal or in the liability of the non-disclosed partner. Also Civil Law, particularly German and Swiss Law, recently seems to drift towards it.[12]

[11] Though the compilers of Justinian's Code treated obligations systematically together with *res* (property).

[12] This objective element within the concept of obligation, the relation between obligation and property, has been brought out by Pollock, *op. cit.* (n. 7),

A similar discordance exists also with respect to still higher divisions used for the arrangement of the separate branches of law. The generalizing notions of "debt relations" (obligations), law of things, family rights, rights of inheritance, which recur nearly identically in modern civil codes as headings of the main divisions (books), do not exist in Common Law. Here the abstraction and combination of concepts has not been carried to the same point. The legal concept of "things" is of no avail. We think of personal and real property. For family rights the somewhat similar term of domestic relations has been introduced, but, again, rather as a title for textbooks covering the relationships of husband and wife, parents and child, marriage, etc., than as a useful general concept of law. The same holds true with regard to inheritance, with the possible exception of modern English law since the Inheritance Act has been passed.

Even the old established, main branches of the Civil Law themselves are not recognized throughout in Common Law, and the terms used are not always coextensive nor equal in importance. There is no distinct discipline of Ecclesiastical (Church) law. Administrative law, though constantly referred to, does not exist in Common Law as a specific general department of law with an organized hierarchy of agencies and courts independent of the ordinary courts, but consists rather of separate combinations of rules for particular divisions, agencies, boards, and commissions handling specific matters. Only a first, modest attempt of unification has been undertaken in the Administrative Procedure Act. Procedure, until lately based upon rules established by the courts for their own use, has still not reached completely the status of a definite branch of law, based on all-governing, broad principles in the sense of the term in Civil Law. Common Law knows

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ch. VIII, and has been particularly discussed by French writers on the general theory of obligation and on comparative law. See esp. Lévy-Ullmann, "La contribution essentielle du droit anglais à la théorie générale de la représentation dans les actes juridiques," *Acta Academiae universalis jurisprudentiae comparativae* 1 (1928) 340-370. Cf. also Schnitzer, *Vergleichende Rechtslehre* (1945) 411.

no comprehensive "civil" law including all the Private law, as codified in the Civil Codes and set apart from the Commercial law, with its separate general principles, as laid down in a Commercial Code. Constitutional law, on the other hand, has for us a much wider scope and includes some all-important concepts, as for instance due process, completely unknown to Civil Law. It pervades the whole field of law and has a paramount position as the supreme law of the land, very much different from its place in Civil Law, where it remains restricted to the role of "Law of the State" and contains the rules for the organization of government and some principles of civil rights, without provisions for their enforcement.[13] And two broad sections of our law, Equity and Statute Law—in its specific meaning as a secondary law of merely additional and exceptional nature worked upon the Common Law, and as such not fit for any, or only strictest interpretation—are hardly understandable to the civilian.

Finally the most fundamental, ultimate partition of the law of all Civil Law systems into the two large departments of public and private law is ineffective in Common Law.[14] Civil Law is dualistic law. The distinction, dating back to the very beginning of Roman history and clearly laid down at the outset of the Digest in the famous quotation from Ulpian, is axiomatic, natural, essential, and even necessary to the civilian, but it was unknown to Germanic law which had been dominant in some of the European countries prior to the "reception" of Roman Law. Its consistency with the then prevailing trends in the political and historical development towards the authoritarian state was one of the reasons for the recep-

[13] How effective the new constitutional provisions will prove in European countries, particularly in Western Germany, remains to be seen.

[14] See Pound, "Public and Private Law," *Cornell Law Quart.* 24 (1939) 469-482, and "Administrative Law, Its Growth, Procedure and Significance," *U. of Pittsburgh Law Rev.* 7 (1941) 269-282. Cf. also Pollock, *op. cit.* (n. 7) 95-103, and Walz, "Public Law," *Encyclopedia of the Social Sciences* 12 (1934) 657-659. The latest extensive study on the subject is by Molitor, *Ueber öffentliches Recht und Privatrecht; eine rechtssystematische Studie* (1949).

tion. Ulpian based the distinction upon the double status of the human being as an individual and as a member of organized society which is endowed with sovereign power, upon the antithesis of individual and common interest. To modern Civil Law theory it is founded on something implied in the very idea of justice, the idea of subordination of individual interests to the public interest. Private law is coordinating law; in its sphere the subjects concerned are on the same level. In the sphere of public law a relationship of super- and subordination exists. Public law has primacy over private law. Public agents must be vested with special functions, privileges, and powers which call for rules different from the standards of private law and entitle them, nowadays, to a special forum of administrative tribunals.

Between those two fundamental sections the broad special branches of law are distributed. A standard of allocation has been developed.

Common Law, on the other hand, ignores this differentiation. It is monistic law. The unity of law is one of its most distinctive characteristics, complete in theory and, in spite of the recent developments in the field of administration, substantially realized in practice. This trait, of utmost importance, is intimately bound up with the fundamental doctrine of the supremacy of law, the very glory of the Common Law, which demands complete equality before the law (substantive and procedural) for all, whether private persons or officers exercising political or governmental authority. The idea of a specific set of rules and concepts for relations coming under public law, and of the lack of competence of the courts in these cases is as strange and unimaginable to the commoner as it is selfevident and ever-present to the civilian.[15]

All these prevailing differentiations in the arrangement of both systems are clearly reflected in the divergent titles of manuals and treatises available in the different jurisdictions.

[15] See Eder, *Anglo-American and Latin-American Law* (1950) 25ff. and Denning, *Freedom under Law* (1949) for recent discussions.

Difference of Legal Terminology

From the difference of concepts the difference of legal terminology results, which constitutes a prolific source of difficulties. Languages develop only those technical words and phrases which are necessary to express the concepts familiar to lawyers of their own country. As we have noticed, linguistic troubles arose when it became necessary in this paper to find English expressions which would evoke the right idea about concepts of Civil Law not familiar to the commoner. Frequently it becomes truly impossible for the civilian to translate into English a word which expresses a fundamental legal concept, and vice versa. And a civilian, in all probability, when reading the titles even of some basic books on Common Law, will not be able to tell what subjects they may deal with.

For such fundamental expressions as "law" and "right" there exists only one word in all of the important European languages to cover both English concepts. Therefore, the distinction between objective and subjective "right" has been devised, but in everyday usage even lawyers do not need, and, therefore, do not always insist on this distinction.

Dictionaries of the traditional kind, aiming only at a linguistic purpose by translating words and phrases, cannot help and as a matter of fact are frequently only misleading.[16] To make things worse, there are numerous technical expressions which exist in both vocabularies. This is only a natural consequence of the fact that lawyers on both sides have borrowed ideas from the other jurisprudence, especially from Roman law. And we must remember that French has been for a long

[16] Their specialization in the legal field and language alone is not the solution. For legal dictionaries see, e.g., Anspach-Coutanche, *Dictionary of Anglo-Belgian Law* (1928); Langstoff, *French-English, English-French Law Dictionary* (1937); Olver, *French-English Dictionary of Legal and Commercial Terms* (1925); Waschke, *Juristisches Taschenwörterbuch: Deutsch-Englisch, Englisch-Deutsch;* Basedow, *Dictionary of Legal Terms: German-English, Englisch-Deutsch* (1947); Bean, *Handbook of Spanish-English and English-Spanish Legal Words and Phrases* (1933); Tejada-Dios, *Spanish and English Legal and Commercial Dictionary* (2nd ed. 1945); Egbert, *Law Dictionary: English-Español-Français-Deutsch* (1949).

period the language used by Common Law courts. But the meaning of such words has often changed or is not coextensive anymore. Thus we might be easily misled by treacherous conclusions. The word "civil" law has been used in this paper as opposed to Common Law, in the sense of the modern legal systems largely derived from Roman Law, but has at least three other different meanings. In classic Roman law it signifies the old, strict quiritarian law as opposed to *jus gentium*. To the modern civilian it may mean the private law contained in a civil code, as opposed to the commercial law contained in a special commercial code, or the complete private law as opposed to criminal law. The English word "bail" has nothing to do at all with the French *bail* (the equivalent of lease). The word "jurisdiction" is used everywhere in legal language. But the idea it imparts is definitely different in Common Law.[17] The term "marriage" has caused numerous difficulties in legal practice and the question might well be raised whether a common law marriage would be a valid marriage in civil law jurisdictions.[18]

Another confusing situation arises sometimes, when a word which has a technical, legal meaning in one language forms part of the common parlance of the other country, as e.g., the word "representation." Therefore, the attempt to describe foreign notions in terms of one's own legal language is always dangerous and may easily lead to misunderstanding and absurdity.

Difference in Categorization

The factual situations and problems which call for determination are, as a rule, present in Common Law and Civil Law jurisdictions alike, and the absence of appropriate concepts in one or the other is often only apparent. The factual situation

[17] For an excellent discussion of the point in its basic aspects see Nussbaum, *Principles of Private International Law* (1943) 192-199. Cf. also Weissenstein, *Anglo-Amerikanisches Rechtswörterbuch* (1950) 96-97, s.v. "Jurisdiction."

[18] Cf. Schlesinger, *op. cit.* (n. 2) 357ff.

is taken care of by connecting it with concepts different from those familiar to the searching lawyer, who as a result of tradition and habit may consider his the only logical solution. But jurists of the other system may have felt and still feel otherwise.

A legal relationship may be placed in different categories by two systems of law. This problem has been discovered within the last decade of the last century by a German (Kahn) and a French writer (Bartin) in the field of International Private Law (Conflict of Laws)—rather late in view of the fact that the technique involved dates back to medieval jurisprudence. In the well-known set-up of conflict rules the choice of law is determined by linking together certain legal relationships (as property right, contract claim, tort claim and so on) with a connecting factor, the "localizator", such as *situs rei,* place of performance, domicile, etc. But it was found that the same set of facts may be subsumed ("characterized") under different legal categories and that the "localizator" may have a different or, at least, not coextensive connotation in the different systems. There the problem of so-called "qualification" arises. Which law should govern? For instance, in the case which brought about the study of Bartin, the problem was whether the rule of the laws of Malta which gave usufruct of one quarter of the property of the deceased husband to his widow was part of the matrimonial *régime des biens* or of the law of succession. Or to take employers' liability: it is of contractual nature in French, of delictual nature in English law. Another good example is presented by our notion of contempt, which is completely unknown as such in European countries. However, the problems involved are taken care of by rules and notions which pertain to different institutions and branches of law, cutting across even the boundary line between substantive and adjective law.[19] Only about thirty years later the theory became known and discussed widely in this country.

[19] An interesting study of this problem has been presented by Murad Ferid as part of the German contribution (*Deutsche Landesreferate,* Tübingen 1950, pp. 542ff.) to the Third International Congress for Comparison of Law at London, 1950.

But the basic problem, the subsumption of facts under legal concepts, and of legal concepts under broader categories, is of much wider range. The task of characterization, or classification and categorization, as it might be called (to leave the less adequate term of qualification to the specific field of conflict of laws where it first has been applied) may become relevant wherever the interplay of foreign and domestic legal notions is, or has to be, contemplated. It gains intensified importance, because of the existing far-reaching conceptual differences, wherever Common and Civil Law come into contact. The lack of correspondence and concordance in classifications constitutes an ever-present obstacle in legal activity involving both systems. Particularly the duplication of concepts for the same or similar factual situations which is caused by the division of Common Law into law and equity has always to be considered. Of course, law and equity have been merged in procedure; but the different concepts in both branches have not; and some general equitable concepts as for instance trust or estoppel may come in, almost at any point.

On the other hand, the use of so called " general parts " in modern Civil Law codes and jurisprudence is a feature completely unfamiliar to the commoner. They are a result of the desire for ever higher abstraction and reduction of legal rules and concepts to the most condensed form, for the practical purpose of avoiding repetitions. There are certain, comparatively few, elements which are permanently recurring in different combinations. They are the " conceptual alphabet " of law, as Ihering has called them in a still admirable comparison of the development of law and of language.[20] Instead of repeating them in connection with every single legal institution, they are condensed as much as possible and set apart as a particular division of an entire branch of law or a code, the same as in mathematics a factor common to several numbers is placed

[20] *Geist des römischen Rechts* I (3rd ed. 1873) 42. Cf. Sohm, *The Institutes*, tr. Ledlie (1907) 31.

outside the bracket.[21] They include such concepts as legal capacity, contract, error, dissent, condition, power of attorney, consent, ratification, limitation, and other more incidental, qualifying elements and modalities which may occur with any situation of facts covered by the respective code, forming what could be called a " general " general part. Other generic concepts are set up for particular subdivisions of the system or code, such as " obligation " or " things ", in general parts applying only to those subdivisions. All those rules and concepts automatically apply to the whole field to which they refer, unless there is a special provision to the contrary; whereas in Common Law the applicability of similar concepts of a more general character, as trust, estoppel, or waiver, must be determined separately with regard to every situation or legal institution.[22]

Reasons for the Existing Situation

Which are, one might ask, the circumstances that have caused such a fundamental divergence in concepts and in the whole structure between Civil and Common Law? The answer has to be found, first, in history. All Civil Law is based on fairly identical concepts derived from Roman Law, as it had been developed by medieval jurists, particularly under the influence of scholasticism and its deductive method, with the ensuing predominance of abstract concepts. In fact, the historic process of reception, express or informal, has worked through an extensive process of characterization, namely, through grafting the concepts of Roman Law upon the inherited institutions. Therefore, in spite of all existing differences in the solution of details, concepts are the same within the sphere of Civil Law. Common Law, on the other hand, not

[21] M. Wolff, *Private International Law* (2nd ed. 1950) 148.

[22] Classification of the same rule or institution may vary (to mention this interesting feature) within the same legal system, both historically and with regard to its different branches. Tax law particularly sometimes calls for divergent classification under economic aspects.

only avoided a full-scale reception of Roman Law, but was very much opposed to it, and even in borrowing from it, never admitted the foreign influence. As Dean Pound summarized it: "Whatever continental law borrows," e.g., from old Germanic law, "it romanizes, whatever Common Law borrows, it anglicizes." [23]

Historical development accounts also for the singular character, more practical than rational, of concepts and classifications in Common Law. It was developed not on theoretical, abstract legal reasoning, but evolved as the whole of rules applied since the thirteenth century by the judges of English royal courts. It emerged, as stated before, from the sphere of a very particular kind of procedure, unknown to other countries. The necessity to include by way of analogy often rather remote facts under the restricted number of actions, led to combinations of facts, rules, and concepts into categories set up in a frequently artificial, not very logical manner.

The further historical fact that Common Law has never been codified or promulgated as a complete system in the continental sense, worked in the same direction. Civil Law classifications were, and are, certainly not the last word in logic, and the need for new arrangements is being recognized, for instance in the case of the Code Napoleon by the French Commission for a new French civil code. But Civil Law everywhere has been reexamined and remodeled several times, with the purpose always of doing away with antiquated ideas according to a methodical plan. Such a complete reconstruction of Common Law has never occurred, save for the undertaking of restatements in this country—which so far has been strictly limited to the mere recapitulation of separate topics within the old traditional framework of concepts and categories—and for the attempt of private codification of English law.

Besides the historical development, it is apparent that in the two systems different ways of thinking are applied.[24] This is

[23] *Loc. cit. supra* n. 3, p. 273.

[24] See McMillan, *Two Ways of Thinking* (1934).

the distinction between the theoretical and the practical mind. Of course, such generalizations are to be taken in a relative sense. But one finds definitely in Civil Law a deep yearning for systematization and logic; a desire to bring order and unity into matter in a rational way, which does not exist to the same extent in Common Law, where tradition and experience seem more important.

It seems difficult to decide whether historical circumstances or basic trends of mind prevailing in the Anglo-Saxon race were more influential in this development, but certainly both elements were at work.

What Can Be Done About this Situation?

First, with regard to the difference in concepts. The theory of conflict of laws [25] has recommended, as one of the solutions to the problem of qualification, the development of an international, independent system of basic legal concepts and categories by means of comparative studies and analytical jurisprudence. But even in this limited field, it seems doubtful whether this goal can be reached without alterations in the national laws themselves. Common Law tradition is very strong and Common Law jurisprudence is too advanced and too well established to let one believe in a fundamental change of its concepts. For this reason ideas of unification and even of extensive assimilation seem not to be very realistic. What can be done, is a detailed study of the prevailing differences and their presentation to the other side. This is an undertaking of enormous range, but it may be of fundamental importance whenever the time for a new organization or a codification of Common Law should come. That some assimilation is conceivable may be seen from the practice of countries whose law is based on both systems (Canada, Louisiana).

With regard to terminology, the effort to arrive at some practical adjustments seems more timely. Law dictionaries of a new kind, not merely concerned with the translation of words

[25] Particularly so Rabel; see *The Conflict of Laws* (1945) 44ff.

but based on the explanation of concepts, can be written; it has been undertaken recently.[26] Another important accomplishment would be the general adoption of definite legal expressions for international usage, somewhat in the way certain Latin terms are used even nowadays between civilians to promote fast understanding. The point would be, not so much whether one or the other, fairly appropriate translation will be selected, but that the one expression selected should enjoy some authority and be employed everywhere. The organization recently established in UNESCO for Comparative Law could very well be assigned the task, first, of working out such solutions in special committees, and then of endowing them with the necessary authority.

One final word of comfort. Fascinating for legal theory and all-important in legal practice as they are, the structural differences, it should well be understood, exist only on the level of technique and method; they do not affect the substance of the legal order in its solutions. Lawyers work in a different manner on one side and the other, and very often they do not apply the same concepts. But the conclusions reached are as a rule basically alike. Differences in decisions do not go deeper than those found in distinct jurisdictions within the orbit of the Civil Law. Solutions very seldom differ to such an extent as to shock our own ideas and our sense of justice. There exists a profound similarity, or even identity, between the two systems as regards the ideologies by which they are inspired and the idea of justice which they serve both.

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[26] By Weissenstein (*op. cit. supra* n. 17), who aims at a combination of linguistic, philological translations with a kind of encyclopedia of the fundamental, different concepts and institutions of the foreign law.

Notes and Reviews

SOME PROBLEMS OF GREEK LAW: A CONSIDERATION OF PRINGSHEIM ON SALE

In the history of classical studies Greek law has been a stepchild, a *quantité négligeable*. The epithets are H. F. Hitzig's, written forty-five years ago but still appropriate. Addressing himself to the theme, "The Significance of Ancient Greek Law for the Comparative Study of Law,"[1] Hitzig raised the question: Did not the Greeks, geniuses that they were, "also climb to the highest peak of development in the sphere of law, in particular of private law?" The negative answer (which Hitzig did not give) is perhaps one reason for the century-long indifference to Greek law. For one who seeks the aesthetic satisfactions of *elegantia iuris*, the Greek world is crude and dreary. The Romans, the canonists, the English, the Germans—they "climbed to the highest peak" while the Greeks foundered in the lowlands.

But suppose we surrender elegance and ask two other questions. (1) What can Greek law teach us about the Greeks—their economy, their social organization, their ideological trends? (2) What is the significance of Greek law and of the relationships between law and other aspects of Greek life for the study of comparative legal history and jurisprudence? Where, for example, does Greek law fit into the various patterns of legal evolution proposed by scholars? Such questions require no affirmative or negative answers, they need arouse no emotional satisfactions or dissatisfactions. And they provide a sound starting-point for a neglected study.[2]

The publication of Fritz Pringsheim's massive work thus takes on particular interest and significance.[3] In the light of the foregoing,

[1] *Zeitschrift für vergleichende Rechtswissenschaft*, XIX (1906), 1-28.

[2] On the way in which improper formulations (usually teleological) of the purposes of legal history have been harmful to the study of Anglo-American legal history, see D. J. Boorstin, "Tradition and Method in Legal History," *Harvard Law Rev.*, LIV (1940/41), 424-36.

[3] *The Greek Law of Sale* (Weimar, Hermann Böhlaus Nachfolger, 1950), xix and 580 pp.

a reviewer's major responsibility is to examine the book as a possible ground-breaker, not as an isolated occurrence, complete and final in itself; to consider basic questions of theory and method rather than the law of sale as such.

I.

After an introductory section devoted chiefly to a lengthy analysis of the Greek law of contract, the book falls into two parts. One, "History and Theory," has chapters on the comparative law of sale, "forms and names" of Greek sale, "theory," duty (not liability) created by the agreement to buy and sell, "ὠνή as acquisition of ownership," payment of price, παράδοσις, and "co-operation of the city and the state." The other part, "Practice," deals with sale on credit, contracts for cash payment with deferred delivery, contracts giving the purchaser a right of seizure, arrha, warranty against eviction and concealed defects, void and voidable sales. That there are gaps is apparent and frankly stated. Pringsheim defines his self-imposed limits in the preface:

> It was not my intention to write a systematic treatise on the whole Greek law of sale . . . . I present what I have learned by reading Greek texts, well knowing that my picture is neither complete nor definite. My main task consisted in the interpretation of texts, and sometimes I was obliged to sacrifice the temptation to publish a more readable book to this foremost duty.

In truth, polemical and exegetical requirements not only pull whole sections out of proportion to the importance of the point under discussion, but they often determine the organization of the analysis at the expense of clarity and structural logic. "It is neither possible," Pringsheim says near the end (p. 501), "nor necessary to summarize the results of this monograph." To a reviewer the necessity does exist, and it is devilishly difficult. One illustration may help explain the problem and also give something of the book's flavor.

The chapter called "History of Greek Sale. Theory" has four sections. The first, on Plato, has five pages evenly divided between some general remarks about Plato's *Laws* and comments on several passages condemning credit and credit sales. Then follow two and a half pages on Aristotle's views on contracts generally. The third section, nearly eight pages long, summarizes and analyzes some pro-

visions in the extant fragment on sale from Theophrastus' *Laws*. The final section, "the law of Alexandria," is based on *P. Hal.* 1 and BGU 1213. Its fifteen pages, some in small type, include parts of the texts of the two papyri, discussion of the readings, five and a half pages on the much debated *amphourion* of the Halle document, and some miscellaneous remarks.[4]

II.

The theory part of the book opens with a two-page chapter called "Thesis," subdivided into seven points. In essence, this is the sound theory of Josef Partsch (to whose memory the volume is dedicated), "amplified and reshaped."

1. "Greek law never abandoned the principle of cash sale."

2. "Since consensual contracts do not exist in Greece the mere informal agreement to sell and to buy is not a contract which binds both parties."

3. "Therefore there are no actions arising out of sale."

4. "Greek law separated the delivery from the cash sale, so that only the payment was left. . . . No 'traditio' is necessary," but for real property "and probably slaves and ships . . . certain forms . . . , varying in different cities, are required to give publicity to the transaction."

5. To validate credit or deferred-delivery sales, various legal devices were made available: combining the sale with a fictitious contract of loan, arrha, or a special agreement giving the right of seizure of the goods (by self-help) to the purchaser.

6. "Although no binding contract of sale exists some agreement must obviously precede each cash sale. . . . But no liability (Haftung) arose; it was merely a duty (Schuld)."

7. If eviction is threatened, "the vendor has to take over the purchaser's defence in the ensuing procedure. Otherwise he is liable and must pay a penalty. But this liability does not arise out of the contract."

If one does not insist on too narrow a connotation of "thesis," three more may be added. Though they do not pertain to sale specifically and they are not elaborated in the same way, they are as essential a part of the book as the seven principles of sale.

[4] For another illustration of the difficulties created by the organization of the book, see note 15.

8. The law of the Greeks has a "special character," based on "their unique method of thinking and research, their flexibility of mind and their critical reasoning" (p. 5).

9. "The simple Greek concept of sale was able to survive in a highly developed cultural and commercial civilization" thanks to "the adroit versatility with which Greek and Hellenistic practitioners managed to satisfy the requirements of a highly civilized world" (p. 501).

10. "In spite of many variations among the laws of more than a hundred independent cities the similarity of Doric and Ionian institutions allows us to speak of 'Greek law' as a unity" (p. 5). ("More than a hundred" is a curious understatement.)

III.

"Sale is a contract." With that sentence Pringsheim opens his second chapter. But what is a contract? If, for example, one accepts the definition of the American Restatement, that a contract is a legally enforceable promise, then the whole of Pringsheim's book is devoted to proving that in Greek law sale is *not* a contract.

Pringsheim continues, in the next sentence but one: "But sale is not only and not mainly a contract. Its result is the transfer of ownership." There is either a logical or a semantic fallacy here. The fact that the result of a sale is transfer of ownership has nothing to do with the question, Is sale only, mainly, or not at all a contract? Nor does Pringsheim suggest what else sale is beyond contract.

The proper juridical classification of sale is a most complex problem. In Anglo-American law, for example, it is a commonplace to say that, "The law of Sales . . . is in one phase part of the law of contract, in another phase part of the law of property."[5] The complexity is multiplied many times over when, as Pringsheim points out, "The whole Greek law of contract must be re-written, or rather must be written for the first time" (p. 14). Pringsheim is also right in saying that "this cannot be done here and now." Where he is not right, in my judgment, is in avoiding the issue by resorting to

[5] K. N. Llewellyn, *Through Title to Contract and a Bit Beyond* (New York Univ. School of Law, Contemporary Law Pamphlets, series 1, no. 5, 1938), 1. Despite a superficial similarity, this formulation is qualitatively different from the three sentences by Pringsheim quoted in the text.

axiomatic formulations. More is involved than the proper classification of sale. Behind that lies the most basic question of all: On what principles and along what lines should Greek law be categorized and analyzed?

If Pringsheim ignores the problem in an explicit sense, he actually answers it implicitly. His unqualified and unquestioning, "Sale is a contract," is apparently the automatic response of an experienced Romanist and civilian, the moment he discovers that conveyance was not a necessary component of the legal transaction. Roman-law classification appears throughout the book. The chapter on contract starts with the question, "Greek consensual contracts?" and ends with the answer, No, for "real" and "formal" elements were both essential. All three adjectives, consensual, real, and formal, are of course Roman. They are often convenient and helpful notions in the analysis of contracts; they are not indispensable, but Pringsheim's formulation precludes alternative analysis. Again, he explains the familiar distinction made by Plato and Aristotle between "voluntary and involuntary agreements" in terms of contract and delict, not only in direct violation of their language but on the unquestioned assumption that the Roman antinomy, contract–delict, is equally appropriate to Greek law (p. 36). Anglo-American law lacks it: contract–tort is not the same. Perhaps our legal analysis would be improved by its introduction. Perhaps, too, it suits Greek law perfectly. But these propositions require demonstration, and none is offered.

At other times, English law serves as a guide, particularly the concepts of legal and equitable ownership. Of several available examples, perhaps the best is Pringsheim's interpretation of the Delphic manumissions, which were accomplished through the legal fiction of selling the slave to Apollo. In such manumissions, says Pringsheim,

> the slave supplies the god with the money with which he purchases him from his master. The sale results in formal ownership by the god, which means freedom for the slave. The situation can be illustrated by a comparison with the English trust. . . . legal ownership belongs to the god but in equity the slave is free . . . . This ownership he gives to the god in trust so that the god becomes the legal, the slave the beneficial owner (pp. 185-86).

Nothing in the whole of Anglo-American law is more subtle, more complicated, and more peculiarly rooted in the particular history of that one legal configuration than the trust and its concomitant notions of legal and equitable (beneficial) interests and estates. Some five hundred years of activity by Chancellors and Masters of the Rolls went into the formulation. When they had ended their work, they built a structure that caused Gierke to say to Maitland: "I can't understand your 'trust'." [6] Yet Pringsheim would have us believe that Athenian and Delphic magistrates and jurors [7] anticipated the English by 1500-odd years. He is not even satisfied with an analogy. The slave is not *like* a beneficial owner, he *is* the beneficial owner. (Cf. p. 108: ". . . the god who is only a trustee is made to speak like a genuine purchaser.") "In equity John Doe has a right of redemption" means that a Court of Equity will uphold that right. What can it possibly mean, with reference to Delphi, that "in equity the slave is free?" The word πιστεύω appears throughout this group of documents, to be sure. And "trust" is a fair translation of πίστις—but "trust" as "faith" or "credit," not the "trust" which Gierke could not understand.[8]

[6] F. W. Maitland, *Equity* (rev. ed. by J. Brunyate, Cambridge, Eng., 1947), 23.

[7] My reference to Athens is justified by Pringsheim's interpretation (pp. 206-7) of Demosthenes 37.4-5.

[8] Though a discussion of the Delphic manumissions would be out of place, some notes on Pringsheim's treatment are necessary. (1) The objective of the fictitious sale is the slave's freedom. How does one get rid of the legal fact of the god's ownership? Merely to say (p. 185), "The slave entrusts himself to the god who protects his material freedom," or (p. 186), "The slave's beneficial ownership . . . is of course identical with his freedom" is, juristically speaking, an evasion of the ownership problem. (2) These texts are the key to Pringsheim's insistence that ὠνή may mean "ownership" and sometimes must. His documentary evidence actually rests on an interpretation of but two of the more than 1000 inscriptions, SGDI 2032.12 and 2084.14, on the basis of which he draws a categorical generalization. But then he comes to such a passage (SGDI 2019.14-15): ἐλευθέρα ἔστω Λαδίκα κατὰ τὰν ὠνὰν τοῦ θεοῦ καὶ κυρία ἔστω ποιοῦσα ὅ κα θέλῃι. Translating ὠνά as "purchase" resolves most of the problems. Pringsheim forbids that rendition and writes (p. 186, n. 1): "The god's legal ownership . . . can also be called ὠνὰ τοῦ θεοῦ and is then identical with the slave's freedom." Thus both halves, the "legal ownership" and the "beneficial ownership," have become "identical with the slave's freedom." (3) By what right did the slave entrust the god with his ownership, anyway? What became of the master? After

In a prefatory remark, Pringsheim writes: "I abstained, however, from making use of such comparison [i.e., with "early systems of law"], except where it seemed indispensable for my task. Greek private law is unique. . . . I especially refrained from comparing Roman and Germanic law. . . ." While refraining from comparisons by and large, Pringsheim introduced foreign notions bodily into the very center of Greek law.

IV.

Pringsheim's theses would seem to require serious consideration of material problems, specifically in the field of economics. Instead, there is again explicit disavowal coupled with implicit introduction of economic conclusions as if they were self-evident. "Since ownership does not pass on the transfer of possession it is not the chief aim of the purchaser to receive the goods sold. Delivery, though of practical importance, does not affect the legal position" (p. 167). That would seem to imply complete reliance on purely formal cate-

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all, the documents begin by saying that the master sold the slave to Apollo. Pringsheim's difficulty centers around the formula, *καθὼς ἐπίστευσε* X (usually the slave) *τῶι θεῶι τὰν ὠνάν*. If *ὠνά* is translated as the "purchase" or the "purchase-transaction," the formula is perfectly clear. Cf. the use of *ὠνή* in Lysias 19.43, where it has just that sense, as Pringsheim himself argues (p. 119). But he insists on "ownership" in the manumission texts and offers the following explanation (p. 185): "ownership is acquired by payment of the price; consequently the acquirer is the person from whom the money came, in these manumissions the slave . . . . This ownership he gives to the god in trust . . . ." There are logical objections to this reasoning; there is also the fact that in a few cases, overlooked by Pringsheim, the money was not the slave's but an *eranos*-loan. Who had ownership then? (4) Pringsheim suggests (p. 186, n. 3) that further evidence for his thesis may lie in SGDI 2146.7, where "the slave seems to be called his own 'buyer': *ὠνάτας*." But G. Daux, *Delphes au II^e et au I^er siècle* (Paris, 1936), 47, n. 2, corrected the erroneous SGDI reading (which, by the way, was *ὠνάτας ἐλεύθερ[ο]ς*—how would Pringsheim explain the second word?) to *ὠνὰ τᾶς ἐλευθερίας*. (5) In a large group of texts there is a qualification of the manumission in the form of *paramone*. Violation of the terms voids the sale and hence the manumission, and the slave returns to his former owner. Pringsheim enters into no systematic discussion of *paramone*, but he must take cognizance of it. In a note he writes (p. 186, n. 6): "Here the legal ownership of the god, the beneficial ownership of the slave are both restricted by the paramone, by the demi-ownership of the manumissor." Not even Maitland could have understood "demi-ownership." (See further at the end of section VI of this review.)

gories. On the other hand, adjustment of law to the requirements of a "highly developed commercial civilization" not only moves us right out of the formal realm into economic categories but makes a significant value-judgment about the Greek economy, namely, that it *was* highly developed commercially.

Pringsheim could not be asked to write a treatise on the economics of sale as an introduction to a book on the law of sale. The choice, however, is not between a treatise and nothing at all. Sale is a transaction ending with a two-way transfer of property; that and that alone is its purpose. Either the law is absolutely indifferent to the nature of the property, to the methods and terms of payment, and to other conditions such as honest description of the qualities of the property, or it is not. If the former, then it is meaningless to speak of adjusting law to a highly developed commercial civilization; if the latter, then some examination of property, payment, and terms is essential.

If space permitted, one could argue that the evidence submitted by Pringsheim leads to a conclusion precisely the opposite of his. One could argue that the Greeks retained the "simple," "primitive" concept of cash sale not because they were "unwilling or unable or too young to develop a complete system of private law with abstract rules" or because of such "specific Greek qualities" as "mobility and impatient progress in its conceptions," but simply because the Greek economy remained a cash-sale economy. The present review must be restricted to a demonstration of Pringsheim's failure to consider economic factors explicitly and some of the consequences.

The second chapter on practice is entitled, "Contracts for Cash Payment with Deferred Delivery." The introductory statement says (pp. 268–69):

> But liabilities for future performance are not compatible with the Greek conception of sale. This is particularly evident if the unascertained things are future goods not yet existing, such as a future crop . . . . With the development of commerce Greek law too had to find a means of satisfying the growing requirement that a promise to deliver should be made enforceable . . . . From Greece we have only a few references to contracts with deferred delivery.

But, with the exception of a reference to Plautus' *Asinaria*, every single text cited in this chapter is an Egyptian papyrus dealing with

farm crops. Pringsheim has apparently uncovered a very special situation, restricted to the agricultural economy of Ptolemaic and Roman Egypt. He does not examine the circumstances behind the transactions or their social and economic significance. As it stands, there is nothing in the chapter to justify his saying, "With the development of commerce Greek law too had to find a means of satisfying the growing requirement that a promise to deliver should be made enforceable."

The next chapter deals with "contracts giving the purchaser a right of seizure." It opens with a general introduction on self-help in Greek law. The remaining forty pages are again restricted to Egypt, apart from a reference to the well-known fact that "the terminology of sale is used for the farming out of taxes, works, offices and priesthoods in Greece," three texts that properly belong in the previous chapter and are not revelant in any case, and a cross-reference to an earlier citation of Theophrastus. The three chief subdivisions reveal still another element of change: (1) "elements of lease in contracts of purchase of a future crop" and "occupation by the purchaser of movables" are exemplified throughout Graeco-Roman Egypt, but (2) "occupation by the purchaser of land" is demonstrated only in texts of the Roman era. Pringsheim neither indicates the distinctions nor considers their implications.

Chapter IV on arrha occupies more than one third of the entire part on practice. Though the formal legal analysis is no doubt correct, it seems quite disproportionate to the significance of the institution. Outside of Egypt, the instances of arrha are so few and so inconsequential as to suggest that earnest money had not entered the economy in a significant way, in other words, that the option as a qualification of the rule of cash sales was too exceptional to justify the notion of a highly developed commercial economy. (One document—an Athenian lease of 300/299 B.C.—has a genuine option clause; it is not examined by Pringsheim.)[9] In Egypt the arrha

[9] IG II² 1241.42-53. Pringsheim cites this text (p. 56, n. 6) with the wrong reference (II 1169), solely for the execution clause. Of course, there are the inevitable passages in Theophrastus' fragment and in the lexica (Harpocration and the so-called Lexica Segueriana), which have baffled every commentator thus far. Pringsheim discusses the three passages for 22 pages, but I can make little of his strained analysis. One illustration must suffice. As evidence that the two lexicographers "are accurate in the expression used," Pringsheim writes (p. 366): "In an ordinary sale the parties are called *οἱ ὠνησάμενοί*

apparently became important. For the third time we are faced with new developments in Egypt and again Pringsheim seems generally indifferent to the point.[10]

For the rest, Practice includes (1) warranty against eviction and concealed defects—an important aspect of the law of sale, but one that is tangential if not altogether irrelevant to the economic aspects now under consideration; (2) a chapter entitled "Sale on Credit" (actually the first chapter of this part of the book), which gives exactly three non-Egyptian texts, one of which ([Aristotle], *Oeconomica* 1347b3), is admittedly dubious, and a second of which is Plato's prohibition of credit sales in the *Laws*, and then runs through a papyrological miscellany ranging over a thousand years; and (3) a four-page chapter on void and voidable sales.

τι τῷ ἀποδομένῳ. But in the special case of an arra the terminology of sale is avoided: ὁ τὸν ἀρραβῶνα δοὺς τῷ λαβόντι." Then he adds the following footnote: "Since the nouns rather than the verbs implying sale have to be avoided in arra transactions it is not striking that Harpocration once . . . speaks of πεπρακώς . . . ." But πεπρακώς indicates that either Harpocration is wrong or Pringsheim is wrong, and Harpocration's use of the word cannot be dismissed with a magical incantation about nouns and verbs. If it is wrong to speak of "sale," it is just as erroneous to say "to sell." (See further in section VI.)

[10] In discussing arrha, Pringsheim makes some very brief economic comments. He writes (p. 352): "Such inequality [i.e., in risk] may be justified by the consideration that the giver [i.e., of the arrha] risks more than the receiver. In an undeveloped economy the receiver more easily finds somebody else to pay the same money, than the giver another person to deliver the same goods." Three comments: (1) What is an undeveloped economy and how is it reconciled with a "highly developed commercial civilization?" (2) The existence of a permanent seller's market in an "undeveloped economy" is an interesting notion; where is the evidence? (3) Pringsheim adopts this explanation from a theory of Heusler's about Germanic law. Elsewhere in the chapter (p. 350, n. 5), he refers to "German ordinances of the Middle Ages which are comparable at least as regards the economic background." Few economic historians will share the view that the feudal economic background of the medieval towns was so neatly comparable to that of the Greek cities. Cf. Pringsheim's proposed attribution of a "feudal landlord" to Hesiod's father (pp. 95-96) and the discussion that follows, none of which is applicable to a truly feudal economy.

V.

What is Greek?

In analyzing contracts, Pringsheim criticizes "modern writers" who "neglect the essential connection between the proof of a contract and its enforceability," i.e., "in court" (pp. 17-18). What, then, is a "Greek" court? Were the popular dicasteries of Athens, the royal judges of the Ptolemies, the courts of Doura-Europas and Avroman, the tribunals of Byzantine Egypt all "Greek" courts? Was Justinian a "Greek" and the courts of his empire "Greek" courts? And what kind of law did these courts enforce? When we say that the Twelve Tables and Julian's *edictum perpetuum* (not to mention the Digest) were codifications of Roman law, we mean that they summarized the law to be enforced by the courts of the Roman state—and nothing else. Similarly, the law under Henry II and the law under George VI of England are both "English law" in that political sense alone.[11] No one will pretend that the law of property, for example, was alike or even comparable in Rome five centuries before Christ and five centuries after, or in England in 1150 and 1950. Nor is "spirit" a safe refuge. It is time, therefore, that we recall that never in antiquity was there a Greece in the sense in which there was a Rome. A few elementary facts may be reviewed briefly.

1. In Aristotle's time, the land-tenure systems of the Greek world ranged from prohibition of alienation to free alienability. A century later the range was extended because "Greek" rule of Egypt and parts of Asia added "royal land" and "royal peasants" to the possibilities. Is it conceivable that the law regarding the sale of real property could follow similar principles for (a) inalienable land, (b) freely alienable land, and (c) Seleucid royal land?

2. From roughly 600 B.C. (Solon's time) to the end of Greek civilization some communities absolutely prohibited execution against the person for private debt whereas others permitted it. Is it not a necessary consequence that the law of debt, of pledge, of execution—even the notion of the person in law—must have been radically different in the two spheres?

[11] Complications arising from such problems as law for foreigners, colonial law, or the reception of a developed legal system into another country are not germane to the present discussion.

3. Plato's *Laws*, however one interprets the work, is in the form of a dialogue among three persons, a Cretan, a Spartan, and an Athenian. It is implicit in the very conception and structure of the book, and it is made explicit by Plato over and over again, that the legal conceptions of the three communities were worlds apart, in spirit as well as in concrete application. Whether Plato stated the spirit and provisions of the respective legal systems accurately or not—or even intended to—is of no moment. His fundamental premise, that basic differences existed, cannot be dismissed without powerful evidence.

Whatever one's theory of the origin of the Greeks, it cannot determine the history of Greek law. " The similarity of Doric and Ionian institutions allows us to speak of ' Greek law ' as a unity " (p. 5). Emphatically, I must say no.[12] At best, this supposed similarity indicates common *beginning* of the law in the days of Greek prehistory. It neither allows nor disallows us to say anything about fourth-century Athens, third-century Delphi, or the second-century Egyptian *chora*. Similarly, " the law of Gortyn . . . represents an early stage of Greek law " (p. 15) is equivocal and misleading. Did the law of *all* the Greek communities go through this stage? If so, why was fifth-century Athens no longer in that stage, when fifth-century Gortyn was? What evidence is there that Gortyn ever transcended that stage; if not, why not?

To be sure, there is difficulty with the sources. " We should like to trace the variations due to race, constitution, development. But in view of the scarcity of our material such an aim is not yet attainable " (p. 6). Unattainable—not unessayable. That the effort is both necessary and feasible is quickly demonstrated. (1) For nearly a century scholars have dealt with the so-called Hellenistic family foundations, always in universals about the Greeks. Now Werner Kamps has discovered that in fact this institution began in a small group of communities in the sphere of the Doric Hexapolis, and that there a major legal innovation was made in the direction of juristic personality which spread to some, but by no means all,

12 Note Pringsheim's own statement regarding strong Rhodian influence on the law of Alexandria (p. 8): " So the addition of Ptolemaic law enables us to balance Athenian with Greek law of a very different sort."

of the Greek cities, notably not to Athens.[13] (2) It has already been indicated that Pringsheim rests heavily on the Delphic manumissions. But this form of manumission, by fictitious sale to a god, is known only from central Greece and Epirus. Whether these geographical limits entail substantive distinctions or merely formal, the problem cannot simply be ignored. Further, these are scarcely the regions to which one would turn for evidences of ingenious manipulation of the law to meet the needs of a "highly developed commercial civilization."

Egypt presents the most difficult problem of all. With commendable caution, Pringsheim makes the following programmatic statement (pp. 6-7):

> Ptolemaic law depends to a high degree on Greek law from the motherland . . . . Of course the influence of Egyptian law has always to be considered. But as long as such a small part only of the existing Demotic papyri has been published conclusions will always remain provisional and risky.

Again (p. 8, n. 1):

> Before the influence of Greek law in Egypt is investigated in detail, every formulation is risky.

Nevertheless, much of the material in the book is Egyptian, even Roman and Byzantine-Egyptian. How does Pringsheim know that a particular legal institution attested in the papyri is "Greek?" Actually, that question is not meaningful until the prior question—what does one mean by "Greek" in such a context?—is answered. Since the latter is not raised, the argument often becomes either circular or ungrounded. One extreme instance may be noted. Pringsheim refers to "contractual clauses usual in Ptolemaic Egypt and probably found also in Greece which reserve the ownership of the crop to the lessor until the rent is paid" (pp. 295-96). In a footnote, he adds:

> The Ptolemaic clause appears so early (228-1 B.C.) and is in such striking contrast with the Egyptian form (Wilcken, P. Freib. III p. 84) that it seems to be imported from Greece. From Greece itself we know only

[13] W. Kamps, "Les origines de la fondation cultuelle dans la Grèce ancienne," *Archives d'histoire du droit oriental,* I (1937), 145-79. Additional insights will be found in another, equally neglected, article by Kamps, "La Fiducie dans le droit de Grand-Grèce et l'origine de la *Mancipatio familiae*," *Revue historique de droit,* 4th ser., XV (1936), 142-55.

the clause *εἶναι ἐνεχυρασίαν . . . ἐκ τῶν ὡραίων τῶν ἐκ τοῦ χωρίου* which gives to the lessor not ownership of the crop, but a title to seizure.[14]

Thus, the only citation for the statement that contractual clauses were " probably found also in Greece which reserve the ownership of the crop to the lessor " is a text proving precisely the opposite, *ownership by the lessee.* On the present evidence, a reversal occurred in Ptolemaic Egypt on a specific legal provision. Was the new law also " Greek? "

VI.

Word study must be exhaustive. In the absence of a thesaurus, no one can claim completeness, to be sure, but a fair approximation is possible. Pringsheim has gone through a great mass of materials, but he has not entirely succeeded in fulfilling his promise: " our main task is to collect and to discuss the whole available material " (p. 92).[15] For one thing, Pringsheim's mastery of the papyri is not matched by equal familiarity with the epigraphical texts. For instance: Between 1928 and 1938 David M. Robinson published fifteen inscriptions from Olynthus, all dating from the years just prior to the city's destruction in 348 B.C. and all seemingly deeds of sale. This invaluable and rather unique group of stones awaits systematic

[14] IG II² 2492.7 (Pringsheim cites it according to the old *editio major,* a curious practice he follows often). Actually, this is not the only pertinent provision known from Greece itself. The so-called *hiera syngraphe* of Delos, *Inscr. de Délos* 503, has two sections (lines 30-38) which lend themselves to a similar interpretation, though not without question.

[15] Nowhere are the difficulties created by the organization of the book better illustrated. Exegetical study of the uses of *ὠνή* is decisive for Pringsheim, but he divides his presentation among three separate blocks (pp. 93-98, 111-23, 179-90), each of which contains much interpolated matter. Additional suggestions, qualifications, and exceptions pop up in the most unexpected places (often in footnotes) throughout the book. Nor is this procedure limited to word study. On p. 165, Pringsheim offers an ingenious, though highly speculative, explanation of three *horoi* (IG II² 2763, 2764, and XII 8, 22), namely, that " the purchaser had already paid the price and fulfilled other requirements for the transfer of land, but had left possession to the vendor." (Proper discussion requires consideration of two other *horoi* overlooked by Pringsheim: IG II² 2716 and *Hesperia,* Supp. VII [1943], 3, no. 2.) But there is no consideration of these documents in the chapter on contract for cash payment with deferred delivery. In the latter, as already indicated, not a single text outside Egypt is cited. We are not aided by the index, which is less than two pages, or by the index of Greek words, which is incomplete. The index of sources seems to be full and accurate.

analysis; they are not mentioned in Pringsheim's book, though he does note briefly a possibly related inscription published much earlier.[16]

Probably the heart of Pringsheim's entire terminological analysis is his demonstration that

> without any exception for all three forms of contract there is only one name: *ὠνή* . . . . *Ὠνή* is the term for sale in the contracts, in inscriptions, in the speeches of the orators. It is not necessary to give references. More important is the statement that *πρᾶσις* is used exceptionally only, and this evidently only if the side of the vendor is emphasized (p. 117).

Then comes this footnote:

> The term is not used by Pindar, Aeschylus, Sophocles, Euripides, Aristophanes, Vorsokr.[5], SVF, Isocrates, Lysias, Andocides, Lycurgos, Dinarchos, Aristotle; *ἐπὶ πρήσι* = for sale: Hdt. 4.17.

The list is inaccurate; *πρᾶσις* is found in Sophocles, frag. 909 Pearson (quoted by Pringsheim on p. 112); in Aristophanes, frag. 567 (quoted in Pollux 7.13; the latter is cited on p. 123, n. 6, erroneously as 1.13); in Euripides, frag. 225; five times in Aristotle (all quoted or cited by Pringsheim and noted in his index of sources). Pringsheim might reply (though he does not make the point explicitly) that all but two of the passages use not *πρᾶσις* but the unitary phrase *ὠνὴ καὶ πρᾶσις* which emphasizes the two-sided character of the transaction (like the Roman *emptio-venditio*). However, Aristophanes, frag. 567, and Aristotle, *Rhetoric* 1361a23, have *πρᾶσις* alone, and *Nicomachean Ethics* 1131a3, *ἑκούσια μὲν τὰ τοιάδε οἷον πρᾶσις ὠνὴ δανεισμὸς ἐγγύη κτλ*, suggests to me two separate, uncon-

[16] Robinson's inscriptions were published in the *Transactions of the American Philological Assn.* for 1928, 1931, 1934, and 1938; another, nearly hopeless, fragment appears in *Excavations at Olynthus,* II (Baltimore, 1930), 101. The possibly related inscription is *Syll.*[3] 832 (Michel 1386), noted by Pringsheim on pp. 109 and 195, n. 4; cf. the inscription published by Wilhelm in *Sitzungsberichte, Akad. Wien, Phil.-hist. Kl.,* CLXVI, 1 (1910), 42, no. 8, and another in *Ἀρχ. Δελτ.*, IX (1924/25), *παρ.* 40, both overlooked by Pringsheim. What makes the omission of the Olynthian inscriptions all the more important is that, apart from papyri, Pringsheim's analysis of "forms" rests on texts like the so-called Tenos land register, *horoi,* or the Delphic manumission inscriptions, none of which is a contract. They are notices and summaries which are not reliable sources of information on the *forms* in which the actual agreements were couched; see H. Steinacker, *Die antiken Grundlagen der frühmittelalterlichen Privaturkunde* (Leipzig and Berlin, 1927), 28, 61.

nected acts, sale and purchase, each standing alone. Pringsheim does not consider the extent to which these same authors use *ὠνή*. The standard indexes reveal the following: never in Pindar, Aeschylus, Aristophanes, Vorsokr.[5], SVF, Isocrates, or Dinarchos; in Sophocles and Aristotle only as *ὠνὴ καὶ πρᾶσις*; in Euripides in one other place; once in Lysias and twice in Andocides. Herodotus has only *ὠνὴ καὶ πρῆσις* (1.153) in addition to the *ἐπὶ πρήσι* of 4.17. The indexes of some contemporaneous writers show that Thucydides used neither word; Aeschines and Aeneas Tacticus, *πρᾶσις* once each, *ὠνή* never; Demosthenes, *πρᾶσις* once, *ὠνή* three times; Xenophon merely *ὠνὴ καὶ πρᾶσις* once. In sum, this analysis proves only that fifth and fourth century writers rarely mentioned sale at all, or, more precisely, rarely used a noun, whether *πρᾶσις* or *ὠνή*.

Why only nouns? Reference has already been made to the fact that Pringsheim seems to think verb usage less important, for reasons he does not give. On occasion he considers verbs, chiefly as they appear in the earliest Greek literature, but he does not pursue their study very far. Particularly noteworthy is his indifference to *ἀποδίδωμι*, which may well be the most commonly used of all verbs meaning "to sell." Although the thesis that conveyance was not essential for a legally valid sale is sound, it is certainly not without significance that *ἀποδίδωμι* denotes precisely "to convey."[17]

When Pringsheim insists, however, that *πρᾶσις* "is used exceptionally only, and this evidently only if the side of the vendor is emphasized," he actually subsumes verbs under nouns. That is evidenced repeatedly in the book. The exceptions are so numerous that the question may properly be raised whether Pringsheim is saying anything more significant than that the texts tend to say "sell" and "sale" when the vendor speaks, "buy" and "purchase" of the purchaser. By shifting the formulation around and labeling one variable (*ὠνή*) the rule, the other (*πρᾶσις*) the exception, Pringsheim establishes sharp juristic categories which, in my judgment, are not warranted. The greater frequency of "buy" words is probably

[17] P. Chantraine, "Conjugaison et histoire des verbes signifiant vendre," *Revue de philologie*, n.s. XIV (1940), at p. 17, stresses the point that *ἀποδίδωμι*, in contrast with *πωλέω*, "se prêtait particulièrement à exprimer l'idée d'une vente réalisée." On p. 98 Pringsheim makes much of the point that the "original" meaning of *ὠνέομαι* and *πωλέω* was "not the sale itself but the bargaining which preceded it, the offer to buy and the offer to sell," and "this meaning lasted for so long a time." Against that, his neglect of *ἀποδίδωμι* becomes all the more striking.

demonstrable, but greater frequency and a rigid rule are two phenomena of an altogether different order.[18] When the point of view is "neutral," ὠνή is apparently the common word, but its use is not invariable.[19]

[18] A similar establishment of categories by creating rules and exceptions is noteworthy. Pringsheim's chapter on contract is devoted almost entirely to the one argument that formality, chiefly through witnessing, was legally required of valid contracts. However, he concedes two exceptions: (1) Contracts "concluded with the co-operation of bankers" could be "concluded without the presence of witnesses" (p. 29). This is based solely on Isocrates 17.2 (not "often emphasized," as Pringsheim says). "Here no witnesses are required," writes Pringsheim, "because the bank-books enjoy a special credibility." But that is not what Isocrates says; he explains the practice of making unwitnessed agreements with bankers by their numerous friends, their wealth, and their reputation. There is not a word about "bank-books." (2) The slave sale in Hypereides 5.8 was certainly valid though unwitnessed (p. 46, n. 1). Having explained that documentation replaced witnesses in Greece proper "only when other forms of publicity were exceptionally plentiful," Pringsheim cites this one passage and adds in the footnote: "We are informed that the vendor had special reasons for securing secrecy and for avoiding publicity . . . . So it seems that at this time other forms could replace witnesses, at least if slaves were sold." Three comments: (a) "Special reasons for avoiding publicity" and "where other forms of publicity were exceptionally plentiful" are mutually contradictory. (b) The special reasons alleged in this case are nothing less than fraud. In what kind of society does the law say that witnesses are mandatory unless "the vendor has special reasons for securing secrecy and for avoiding publicity?" It would also be peculiar for the law to grant an express exception to bankers, who were almost without exception not citizens of Athens and whose reputation, despite Isocrates, was not uniformly excellent. Nor does our evidence indicate that agreements with bankers were *regularly* unwitnessed. (c) Pringsheim's casual "at least if slaves were sold" suggests variations according to the objects sold, and, as we have seen, this approach is not followed in the book. In sum, Pringsheim has demonstrated only the obvious point that Greeks rarely made important agreements without witnesses, not that there was a rule of law in the matter.

[19] Pringsheim holds that auction sales constitute the major exception; πρᾶσις is always used because "the predominance of the vendor's part" is inherent in the auction. However, in a mid-fourth century Mylasa decree (*Syll.*[3] 167.45-48) we read καὶ τὰ κτήματα ἐπώλησεν ἡ πόλις δημοσίᾳ, ἐπαρὰς ποιησαμένη, τούτων τὰς ὠνὰς τοῖς πριαμένοις κυρίας εἶναι. From Pringsheim's rule we should have expected πρᾶσις. He cites the text (p. 196) in a non-terminological context and dismisses the use of ὠνή in a note: "The term means again . . . ownership acquired by purchase." In a nearly contemporaneous Chian document, SGDI 5653 C 7-11, we read [ὃ]ς ἂν τὰς πρήσις

After all, law, like any discipline, acquires a body of technical terms primarily through the efforts of a close-knit corps of professionals (bureaucrats, professors, guildsmen, judges).[20] No such group existed at any time or place in the Greek city-states, at least before the Roman era. Furthermore, even in societies in which the profession has developed its technical legal language, the layman remains ignorant of many of the terms and regularly "misuses" the others. One need only cite the everyday usage of "contract," "negligence," or "trust" in English, or of *Besitz* and *Eigentum* in German. Greek city-state sources, whether literary or epigraphical, are lay in origin. We have no right, therefore, to expect them to be more "professional" or "technical" than their modern counterparts. Not even the Attic orators constitute a genuine exception. They were writing for a lay audience, the dicasts. They were successful advocates because of their rhetorical skill, not their juristic proficiency, and stylistic demands were overriding.

Here are two administrative documents (unnoticed by Pringsheim), each from a different sector of the Greek world, which neatly demonstrate the absence of linguistic precision:

1. The published record of the Athenian *poletai* for the year 367/6 B.C. reports the sale of a confiscated house against which several private claims were adjudicated prior to the auction.[21] The claims are reported in direct discourse. One says (lines 23-24): *ἀποδομένο ἐμο<ι> . . . τὴν οἰκίαν ταύτην Θεοφίλου*, the other (lines 33-34): *πριαμένων ἡμῶν τὴν οἰκίαν ταύτην παρὰ Θεοφίλου . . . ἐπὶ λύσει.*

ἀκρατέα[ς] ποιῆι, ἐπαράσθω κατ' αὐτ[οῦ] ὁ βασιλεός. (This text is drafted entirely from the buyer's viewpoint.) Is *πρῆσις* here, too, "ownership?" If so, another rule of Pringsheim's has been broken. (Both texts quite certainly deal with auction sales.) Cf. *Syll.*[3] 633 (*c.* 180 B.C.), where we find both *τοὺς . . . τὴν ὠνὴν ἔχοντας τῶς τέλους* (line 90) and *τὴν πρᾶσιν τοῦ τέλους* (line 100). Again two rules are in conflict: the use of *πρᾶσις* for auction and *ὠνή* for tax-farming.

[20] Primitive societies seem to present an exception which need not concern us here because the explanation lies in circumstances not relevant to the Greek world.

[21] This text, *Hesperia*, X (1941), 14, no. 1, is juristically one of the most valuable Athenian finds. I have examined the security aspects at length in two forthcoming publications: an article to appear in the studies in honor of V. Arangio-Ruiz and a volume, *Studies in Land and Credit in Ancient Athens*, to be issued by the Rutgers University Press.

Identical circumstances, identical points of view, but one says "sold" and the other "bought."[22]

2. A stele found in the temple of Apollo in Miletus contains a letter of Antiochus II to the governor Metrophanes regarding the sale of some land together with Metrophanes' covering letter transmitting the king's orders to a lower official.[23] Among the instructions is a publicity provision: *τὴν ὠνὴν ἀναγράψαι* (line 27). Metrophanes refers to it twice, once (line 7) [*ἀν*]*αγράψαι τήν τε πρᾶσιν*, the second time (lines 14/15) *καταχω*[*ρί*]*σαι τὴν ὠνήν*. There can be no doubt that the meaning is "sale" (the king opens his letter with *πεπ*[*ρά*]*καμεν Λαοδίκηι*) and that Metrophanes, at least, knew nothing about a distinction between *ὠνή* and *πρᾶσις*.

Finally, legal terminology and legal institutions are never so perfectly adjusted that a change in one necessarily indicates a change in the other, or that lack of change always corresponds. The word "mortgage" persists despite the more or less complete reversal that has taken place in the institution itself. It would be a bold jurist indeed who would argue that loans are legally something different in the state of Maine from elsewhere in the United States because the inhabitants of that state speak of "hiring" money, not of "borrowing" money. Yet that is implicitly what Pringsheim does with Greek words. The Delphic manumissions will again serve to illustrate. This large group of texts is rather rare in its stylized uniformity of expression, the work of the priestly functionaries. Nevertheless, both changes in formula and the interchangeable use of "technical terms" have been demonstrated.[24] The act of sale is most commonly stated in Pringsheim's Form II: *Ἀπέδοτο* A (*τῷ* B). Occasionally (Pringsheim gives but two instances, one from Delphi, p. 108), we find Form III: *Ἐπρίατο* B *παρὰ* A. Pringsheim's difficulty is that he has decided that Form III is "the main Greek form of

[22] Security transactions in the form of sale (*πρᾶσις ἐπὶ λύσει*), not sales proper are involved here, but that distinction is immaterial in the analysis of the terminology, as Pringsheim also holds, for he spends many pages on the language of *πρᾶσις ἐπὶ λύσει*.

[23] C. B. Welles, *Royal Correspondence in the Hellenistic Period* (New Haven, 1934), nos. 18-19.

[24] See M. Lejeune, *Observations sur la langue des actes d'affranchissement delphiques* (Paris, 1939), and briefly W. L. Westermann, "Extinction of Claims in Slave Sales at Delphi," *Journal of Juristic Papyrology*, IV (1950), at pp. 50-52.

sale," whereas II "could not be defined" but "is perhaps to be explained as a descendant of type I," and I "did not seem to be pure Greek" (p. 107). Since he will apparently not accept the fact of fashion in language and since he is unqualifiedly insistent about the forms and their "Greek" or "non-Greek" character, he must find a way out, as follows. On the prevailing use of II (p. 105):

> The master sells his slave to the god on trust. The god acquires only formal property, and in fact the slave is to be free .... The vendor declares his wishes: no wonder that the form is a one-sided declaration.

Then (p. 108):

> Manumission sales are regularly found according to type II. But type III was so much the prevailing form of sale that it is sometimes to be found even in manumissions. This is all the more striking as the god who is only a trustee is made to speak like a genuine purchaser.

All this is not an argument against the closest possible study of the terminology. On the contrary, I fully share Pringsheim's judgment that such study is basic. Where I cannot go along with him is on his methods of analysis or on his rather mechanical drawing of implications and broad generalizations.

VII.

It would require at least a volume of the same size to examine all of Pringsheim's ideas. No matter how much one may disagree with many things he says, even with some of his underlying conceptions, the fact remains that the book has such a wealth of material and so many interesting analyses and insights that its impact will be felt for a long time to come. As legal historians begin to follow the many leads Pringsheim has opened, there will be much discussion of the book and of the problems it raises. Perhaps it is not too much to hope that this publication marks the beginning of a new era in the evaluation of Greek law. Pringsheim could have no greater satisfaction for the many years he has devoted to its study.

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Mélanges Fernand De Visscher, vols. I and II (1949), III and IV (1950). Brussels: Office International de Librairie. Pp. xlviii, 552, 610; 594; 572, respectively.

September 27, 1949, marked the thirtieth anniversary of the first inauguration as a professor of Roman law of Fernand De Visscher, the outstanding Belgian Romanist and Internationalist. De Visscher's colleagues, L. Caes, R. Dekkers, and R. Henrion, celebrated the event by setting aside as a *Festschrift* the vols. II–V of their new (since 1948) *Revue Internationale des Droits de l'Antiquité*.[1] More than one hundred scholars—chiefly of France (including Algiers and Indo-China) and the Low Countries, but also of Austria, Czechoslovakia, Denmark, England, Germany, Greece, Hungary, Italy, Poland, Portugal, Romania, Spain, Switzerland, and the United States—responded to the call of the editors. Their combined efforts have resulted in an impressive testimony to the vigor of present-day Romanistics and have given this collection a place of honor among recent publications in the fields of Roman law and related subjects.

The papers assembled in the four volumes (henceforth cited as I–IV, referring to their numbers among the *Mélanges* as such) cover a very wide range. Not only is almost every special interest within the limits of ancient and medieval legal history represented, but in addition to investigations into legal and constitutional problems, we find several discussions of matters of general and religious history. Among the latter group, J. Carcopino's *Observations sur le "De Suppliciis"*, III 229–66, deserves special mention. The author analyzes, in the light of the troubled political situation of its time, Cicero's diatribe (*Verr.* II, 5) on the judicial murders allegedly committed by Verres and seeks to show the flimsy nature of Cicero's accusations.[2]

[1] In the meantime vol. VI (1951) of the *Revue* has been issued.

[2] See further: R. Goossens, *La république des paysans* (III 551-77); A. Aymard, Βασιλεὺς Μακεδόνων (III 61-97); S. De Laet, *L'évolution de l'administration domanière au Haut-Empire et les sources juridiques* (I 215-21); G. Dumézil, *Quelques cas anciens de "liquidation des vieillards"* (III 447-54); R. Demangel, *Variations sur la πίστις* (I 223-41); V. Basanoff, *L'épisode des joueurs de flûte chez Tite-Live* (I 65-81); R. Bloch, *Les prodiges romains et la "Procuratio prodigiorum"* (I 119-31); C. Mohrmann, *Rationabilis-λογικός* (IV 225-34).

Most of the articles command interest, and some are of considerable importance. In the following, a rapid survey of the contents of the *Mélanges,* in so far as they concern the legal historian, will be given, with brief critical observations on some of the contributions. For more detailed reports, the reader may be referred to summaries printed in *IVRA* (vol. I [1950] bringing abstracts of papers in vols. I and II, vol. II [1951] of those in vols. III and IV of the *Mélanges*).[3]

Two papers on Babylonian law and two on biblical problems represent the ancient Near East. W. F. Leemans, *The rate of interest in old-Babylonian times* (IV 7–34), explains the economic reason for the seemingly high standard rates of 20 per cent on loans of silver and of 33⅓ per cent on loans of barley. According to E. Szlechter, *La nature juridique de la clause " qaqqadam kullurêsâm kullu "* (IV 477–507), the juridical idea expressed by that phrase, frequent in Babylonian contracts, is not, as commonly assumed, that of " standing surety " but rather that of " conserving the principal," the underlying concept being similar to that of the *depositum irregulare.* P. J. Verdam, *" On ne fera point mourir les enfants pour les pères " en droit biblique* (II 393–416), upholds the Mosaic provenance of this principle (Deut. 24.16); according to the author, it referred to private relations, while cases which seem to contradict it should be explained in part as mere political crimes (Saul's execution of the people of Nob, 1 Sam. 22.18f.) and in part as examples of divine justice (cf. the second Commandment). D. Daube, *Error and accident in the Bible* (I 189–213), discusses the problem of error as a tragic motif in biblical narratives, as well as in Greek and Germanic mythology; this psychological interest explains the almost complete absence of cases of accidental killing in biblical narratives, in contrast with legislative texts stressing the latter aspect. The author, unfortunately, undertakes no analysis of the types of error occurring in biblical stories, nor does he try to trace the history of its distinction from accident in Hebrew law. It is hoped that further inquiries into the topic, planned by Daube, will shed light on this highly interesting problem.

The majority of the papers dealing with topics of classical Greek or Hellenistic law—there is about a dozen of them—belong to the

[3] See also G. Grosso's review of vols. I and II of the *Mélanges* in *IVRA* I 313-24.

minor contributions, as regards both their size and import. A few of them, however, do have a claim to the attention of non-specialists.[4]

Perhaps the most remarkable among them is E. Bikerman, *Remarques sur le droit des gens dans la Grèce classique* (III 99–127), an inquiry into the concept of symmachy, which is defined, in conformity with the literal meaning of the word, as a mere obligation of armed support (whether based on an equal treaty or on subjection of one party to the other), rather than a true alliance and co-belligerency. The author is able to draw some general conclusions as to the Greek concepts of belligerency and hegemony; the historian of Greek private law will also be interested in his remarks, p. 123f., on the Greek law of property. G. S. Maridakis's (*Démosthène, théoricien du droit;* IV 255–81) analysis of Dem. *or.* 24 (*c. Timocr.*) shows that Greek legal theory of the fourth century B.C. had succeeded in differentiating private and public law and in formulating such purely legal principles as the non-retroactivity of statutes, *impossibilium nulla obligatio,* and others, only much later arrived at again by the Romans independently—thus the author —and, in a significant contrast with the Greek approach, inductively. Maridakis does not discuss the practical import of such philosophical and rhetorical theories; in view of the absence of a professional class of jurists, however, it remains doubtful if they were ever firmly incorporated, by way of precedent or otherwise, in the positive Greek law,[5] in spite of their being occasionally invoked in actual litigation, as indeed evidenced by the speech under discussion. The Greek law of procedure is the subject of U. E. Paoli, *La ἔφεσις εἰς τὸ δικαστήριον en droit attique* (IV 325–37): The *ephesis* was not an appeal but a refusal to abide (ἐμμένειν) by the decision of the magistrate or arbitrator, which made this decision immediately

[4] See further: J. Miles, *The court in Phreatto* (IV 219-24); V. Arangio-Ruiz, *Intorno agli ἀστοί dell'Egitto greco-romano* (III 7-20); H. I. Bell, *Brother and sister marriage in Graeco-Roman Egypt* (I 83-92); A. Christophilopoulos, *Ἀθάνατος en droit grec* (III 297-301); M. T. Lenger, *Les vestiges de la législation des Ptolemées en Égypte à l'époque romaine* (II 69-81); T. Reekmans and E. van't Dack, *A 2nd century B.C. petition (Bodleian Ms. Gr. Class. c (87) P)* (IV 417-27); R. Taubenschlag, *The law of associations in Greco-Roman Egypt* (IV 509-14).

[5] Cf. W. Kunkel, *Z. Sav. St.* XLVIII (1928), 710, Wolff, *Seminar* III (1945) 103f. See also F. Pringsheim, *The Greek Law of Sale* (Weimar, 1950) 2ff.

ineffective; therefore, in the event of an *ephesis*, the issue had to be brought before the heliasts by a new action of the plaintiff. The author, who, regrettably, cites only philological literature, seems to have overlooked that his result, doubtless correct, is in essential agreement with A. Steinwenter's theory on the *ephesis*.[6]

The relationship between Greek and foreign institutions is the main topic of two papers concerning the Greek law of Hellenistic times. C. Préaux's brief but substantial essay *Sur la réception des droits dans l'Égypte gréco-romaine* (IV 349–59) presents, in my opinion correctly in all essential respects, Greek and Egyptian law as always remaining two separate systems little influenced by one another, despite the fact that individuals might make promiscuous use of either law. C. B. Welles, *Manumission and adoption* (II 507–20), likewise correctly, understands a Calymnian inscription of the imperial period[7] to the effect that it documents the freeing of a slave girl and her simultaneous adoption by the husband of the manumissor. While wisely avoiding any conclusions as to actual influences, he points out the close resemblance of the recorded transaction, as a social fact, to arrangements encountered in Babylonian documents of a much earlier age.

The bulk of the articles in the *Mélanges* deal of course with Roman law, and it is here, also, that we find the most important, but also the most controversial among the contributions. Lack of time and space and frequently of sufficient competence prevent me from giving a full critical account of all of them. I have to confine myself to a discussion of a few and, for the rest, to be content with a summary description of the topics treated in these papers.

B. Lapicki, *Le rôle du droit dans la Rome antique* (II 7–36), seeks the Roman answer to the questions of the sense and purpose of law, and the Roman solution of the tension between individual liberty and the necessities of the social order—not always clinging, as it seems to me, to historical reality. The foundations of the Roman legal order are also, in a more specific manner, the theme of three Italian contributions. Two of them—G. Grosso, *Gaius III*

[6] See Steinwenter, *Die Streitbeendigung durch Urteil, Schiedsspruch und Vergleich nach griechischem Rechte* (Munich, 1925) 71, also L. Gernet, *Rev. des Études Grecques* LII (1939) 389 n. 1, 407 n. 1.

[7] Ed. M. Segrè, *Mem. pubbl. a cura dell'Ist. Stor.-Arch. F.E.R.T. e della R. Deput. di Storia Patria per Rodi* III (1938) 55.

133: Riflessioni sul concetto del "ius gentium" (I 395–400), and P. Frezza, *Jus gentium* (I 259–308)—continue the current debate on this concept. Grosso aims at a clarification of the classical notion of *ius gentium;* he opposes to the unitarian concept postulated by G. Lombardi [8] a dual concept characterized by a theoretical aspect (the common law of all men, based on the *naturalis ratio*) and by a practical aspect (institutions common to Romans and peregrines). Frezza seeks to trace the road travelled by the *ius gentium* in fulfilling its historical function of overcoming, in the interest of substantial justice, the formalism of the old *ius civile:* born of the practical problem of granting legal protection to foreigners, and thereby linked to the concept of *fides,* the notion made possible the introduction of the *fides* into the jurisdiction of the *praetor urbanus* and thus enabled philosophers and orators (Cicero, Seneca) and soon also the jurists to realize the ethical contents of the legal order. I must refrain from a discussion of the penetrating and highly suggestive investigation made by Frezza. No less suggestive, although, perhaps, not completely free from exaggeration, is the third of these papers, B. Biondi, *La concezione cristiana del diritto naturale nella codificazione giustinianea* (III 129–58).

A problem of paramount historical importance, which is still waiting for thorough investigation, is tackled by S. Riccobono in his brief sketch entitled *"Cognitio extra ordinem": Nozioni e caratteri* (II 277–93). One may wonder if the eminent Romanist does not overrate somewhat the revolutionary character of the *ius novum.* The flexible *cognitio extraordinaria* was of course a convenient instrument in the hands of the emperors for introducing certain innovations and for making some adjustments which it would have been difficult to achieve within the closed system of actions of the *ordo iudiciorum.* But the *cognitio extraordinaria,* too, at least in the later classical period, developed under the direction of the same jurists who wrote the great commentaries on *ius civile* and *ius honorarium.* It is hard to imagine—precisely in view of Riccobono's own, well-known insistence on the progressive attitude of classical jurisprudence, especially with respect to the doctrine of *voluntas*—that the gap between the *ius novum* and the traditional order should

[8] *Ricerche in tema di ius gentium* (Rome, 1946), *Sul concetto di ius gentium* (Rome, 1947), "Diritto umano e 'ius gentium'" in *Stud. et Doc. Hist. et Iur.* XVI (1950) 254ff.

have been as wide as it appears in Riccobono's presentation. The *Mélanges* itself contains two articles illuminating, *int. al.*, the participation of the jurists in the development of the imperial law: A. A. Schiller's interesting essay on *The jurists and the praefects of Rome* (II 319–59) and the excellent discussion of G. G. Archi on *Gli studi di diritto penale da Ferrini a noi: Considerazioni e punti di vista* (III 21–60).

L. Wenger, *Neue Diskussionen zum Problem "Reichsrecht und Volksrecht"* (II 521–50), mediates successfully, as I believe, between E. Schönbauer and V. Arangio-Ruiz. He accepts the former's view of a compatibility of Roman and peregrine citizenship and states that local law survived in the provincial cautelary practice, while Roman law was introduced, and gradually gained prevalence, through the activities of Roman judicial authorities.

Papers on the primitive institutions of Rome are what one should expect in a collection of writings dedicated to F. De Visscher. C. W. Westrup, *Quelques recherches sur le problème des origines de Rome* (II 551–76), deals with the beginnings of Rome as a city-state, emphasizing the role of the Etruscans. While Westrup confines his investigation to political developments, F. De Martino, *Storia arcaica e diritto romano privato* (III 387–407), attributes to Etruscan conceptions a strong influence on the formation of the Roman law of succession and marriage; in my opinion not without, at least, considerable exaggeration: if, to name but one instance, the independence of the Etruscan woman, perhaps correctly assumed by the author, was responsible for the introduction of the free marriage, why did it take the Romans until the XII Tables to enact the *trinoctium?* A new answer to an old question is proposed by V.–A. Georgesco, *"Partes secanto"* (I 367–84). Taking his cue from a hypothesis by De Visscher on Gai. Aug. 4.83,[9] he identifies the *partes* as the hair and nails of the debtor. One may ask indeed what should be the purpose of such mutilation; in the case discussed by De Visscher the *noxae deditio* of a dead man, not the realization of the liability of a living man, was in question. Was the *partes secare* of the XII Tables a magical act effecting the creditor's power over the debtor?

Carrying Bonfante's famous theory to its ultimate consequences, H. Lévy-Bruhl, *"Heres"* (II 137–76), draws a sharp line between

[9] *Rev. Hist. de dr. fr. et étr.* 1943, p. 85f.

succession into the estate and succession into the position of the *pater familias* as the "spiritual leader" (but without *potestas*) of the family; it was only the latter that characterized the *heres,* who therefore could be designated, as late as the XII Tables, only by will and had to be chosen from among the *sui puberes.* Like many theories of the author, this too is as difficult to accept as it is ingenious. Suffice it to ask only two questions: Who was to become the *chef spirituel* when the *heres* died? When one of the brothers and members of the *consortium* died, leaving his own *heres,* what was the latter's relationship to the *heres* of the grandfather? From the standpoint of the author, we should answer that the family of the original *heres* attained the rank of a gentile dynasty, while, on the other hand, the *filii* of any other member of the clan were automatically excluded as soon as their *pater* disappeared, provided he had named his own *heres*—two conclusions which would certainly be inconsistent with all we know about the primitive Roman family.[10]

Last but not least, I wish to mention here the fine investigation into "*Verba praeire*" *dans la legis actio* (IV 281–324) by J. Paoli. The writer shows that the expression (Sen., *de tranqu. an.* 3.4)[11] refers to the solemn instruction of the *praetor* by the *pontifex* about the *tria verba: do, dico, addico;* such formal instruction of magistrates and parties, and not the mere giving of advice or the exercise of any jurisdiction, was the original function of the *pontifices* and the means by which they exerted their control over the formal acts of the primitive law.

Coming to papers dealing more specifically with individual institutions, we find questions of constitutional history and law discussed by E. Gintowt, "*Dictator Romanus*" (I 385–94); E. Cavaignac, *L'évolution de l'organisation centuriate d'après les derniers travaux numismatiques* (I 173–83); and F. De Robertis, *Elementi istituzionali ed elementi personali nella configurazione giuridica del principato* (III 409–33), a penetrating study showing the gradual realization of the monarchy as an institution rather than a mere conglomeration of powers personally conferred on the *princeps.*

[10] Other objections in *IVRA* I 308, *Latomus* IX (1950) 495. See also Kaser, *IVRA* I 344f., Grosso, *ibid.* 315.

[11] There is a dispute about the correct reading of the passage. The author follows R. Düll, *Z. Sav. St.* LVII (1937) 81.

According to the author, the new notion was not clearly conceived until the reign of Gallienus and Valerianus. It was also problems of public law that attracted G. Luzzatto, *Appunti sul "jus italicum"* (IV 79–110), and A. Guarino, *Il "jus publice respondendi"* (I 401–19), the latter with results partly differing from those proposed by W. Kunkel in his simultaneous study;[12] Kunkel's theory seems to me preferable.[13] A. Piganiol, *"Venire in fidem"* (IV 339–47), is concerned with Roman principles of international law.

Four contributions have procedural questions for their subjects. Two of them—H. F. Jolowicz, *The iudex and the arbitral principle* (I 477–92), and A. Biscardi, *Quelques observations sur la litis contestatio* (III 159–68)—have a bearing upon the current debate concerning the origin and underlying concepts of Roman procedure. Both papers, especially that of Jolowicz, merit close attention, but a discussion would exceed the limits of this review. More specific problems of the formulary procedure are dealt with by G. Pugliese in his excellent inquiry into *Les voies de recours sanctionnant l'in ius vocatio* (II 249–76) and by M. Philonenko, *"Intentio" dans les formules "in factum conceptae"* (II 231–47), the latter with unacceptable results.[14]

M. Lemosse, *Affranchissement, clientèle, droit de cité* (II 37–68) analyses the importance of manumission for the acquisition of citizenship. According to the author, the latter effect was originally reserved to the *manumissio censu* and it was only after the censorship of Appius Claudius Caecus that a *manumissio vindicta* could produce it; before that time, the *libertus* became a client of the *gens* of his manumissor, but the act was ignored by the city. The paper offers interesting observations as to the right of the *patronus*. Lévy-Bruhl was already mentioned. Problems of detail in the law of family and succession are treated by M. H. Prévost, *L'adoption*

[12] *Z. Sav. St.* LXVI (1948) 423ff.

[13] Guarino's (*Ann. Sem. Giur. Catania* III [1949], p. 17ff. of the reprint) reply to Kunkel does not convince me. As for the words: *posteaque hoc coepit beneficium dari* in Pomp. D. 1.2.2.48 *i.f.*, I am inclined to consider them as a gloss caused by the sentence: *et ex illo tempore peti hoc beneficio coepit*, in § 49. The remark is out of place in § 48.

[14] The author's argument is largely based on an erroneous reading of Gai. 4.41: *actor ad ius suum concludit*. The correct reading is: *desiderium suum concludit*. Cf. also Grosso, *IVRA* I 322, who points out the incompatibility of Philonenko's theory with Gai. 4.46.

d'Octave (IV 361–81); C. Castello, *Sulla condizione del figlio concepito legittimamente e illegittimamente nel diritto romano* (III 267–96); G. Boyer, *Le droit successoral romain dans les œuvres de Polybe* (III 169–87); J. C. van Oven, *"Laudatio Turiae" I 13–26* (III 373–91); and R. Besnier, *L'application des lois caducaires d'Auguste d'après le Gnomon de l'Idiologue* (I 93–118). Very interesting, although probably not above criticism in all its parts, is J. Gaudemet's study on *"Iustum matrimonium"* (I 309–66).[15]

There are numerous articles dealing with special problems of the classical and postclassical law of property and obligations; a few of them are open to criticism, while others contribute valuable additions to our knowledge. In the main, I have to content myself with a mere enumeration of titles, reserving only three or four for brief discussion; I wish to make it clear that this selection is purely subjective and no reflection on the value or importance of papers not singled out for comment: A. Magdelain, *"Auctoritas rerum"* (IV 127–53), whose conclusions will hardly meet with approval; R. Monier, *La possession est-elle une "res incorporalis" en droit romain classique?* (IV 235–44); R. Henrion, *De la possession de mauvaise foi d'une chose volée: Une leçon du droit romain* (III 589–91); G. Branca, *Considerazioni intorno alla proprietà superficiaria nel diritto giustinianeo* (III 189–201); U. Brasiello, *Pegno e "mancipatio fiduciae causa" nella alienazione dei beni degli incapaci* (III 203–21), not convincing; S. Solazzi, *"Interdictum quam servitutem"?* (IV 465–75); L. Herrmann, *La controverse du Noyer* (I 421–24); J. Hubaux et M. Hicter, *Le fouilleur et le trésor* (I 425–37); R. Dekkers, *Les méfaits de la "stipulatio"* (III 361–86); A. d'Ors, *Una hipótesis crítica sobre la cruz "Centum Capuae"* (III 435–46); J. Roussier-Theaux, *Le sens du mot "pollicitatio" chez les juristes romains* (II 295–317); J. P. Lévy, *Essai sur la promesse de donation en droit romain* (II 91–136); P. Meylan, *Paul. D. 21.2. 11 pr. et la question des risques dans le contrat de vente* (II 193–212); Z. Lisowski, *La prétendue contradiction entre C. 4.21.17 et Inst. J. 3.23 pr.* (IV 73–77); A. E. Giffard, *Observations sur l'enrichissement injuste incertain* (III 499–511); E. Weiss, *"Proscriptio debitorum"* (II 501–506); B. Cohen, *Contrectatio in Jewish and Roman law* (I 133–56).

[15] I am glad to state the substantial agreement between the author and myself (*Z. Sav. St.* LXVII [1950] 261ff.) as to the postclassical concept of marriage.

M. Villey, *Du sens de l'expression "ius in re" en droit romain classique* (II 417–36), contrasts correctly, in my opinion, the classical concept with the modern civilian concept of the "real right": The Roman *dominium* was not a *ius in re* but identical with the *res* itself, while the various *iura in re* were conceived as individual powers; this theory fits in with the original Roman concept of *ius*.[16] In opposing, however, the *ius in re* as a *res incorporalis* to the *res corporalis*, characterized by the *dominium*, the author seems to impute to the Roman jurists an abstraction which was not really theirs.

M. Kaser, *Die Rechtsgrundlage der "actio rei uxoriae"* (I 511–50), finds the origin of this remedy in a praetorian action (in the beginning, like all praetorian actions, of a penal nature), which was equipped with a *formula in ius concepta* after the regulation of the *retentiones* by the Augustean legislation had implicitly recognized the civil nature of the claim. Despite Gai. 4.62 (cf. also D. 4.5.8), the classical jurists did not consider the *iud. rei ux.* as a *iud. bonae fidei*. I must refrain from a detailed examination of Kaser's highly suggestive but rather hypothetical theory and restrict myself to the observation that even if *Vat.* 94 (Paul. 7 *resp.*), the chief testimony for the inherence in the *actio rei ux.* of the *exc. doli*, is spurious as regards this point, the question remains how the early postclassical school, which would be responsible for the manipulation of the text, arrived at this dogma.

Two Hungarian Romanists have chosen the problem of *culpa* for their topic. G. Marton, *Un essai de réconstruction du développement probable du système classique romain de responsabilité civile* (II 171–91), presents a broad panoramic picture of the stages in which the principle of liability for non-intentional damages developed in torts and contracts, stressing, in particular, the role of the *bona fides*. More specific, and based on a diligent exegesis of sources, is K. Visky's study on *La responsabilité dans le droit romain à la fin de la République* (II 437–84). Visky shows convincingly that already the *veteres* paid attention to the conduct of the debtor and admitted a responsibility in cases of a behavior which was reproachable but did not meet the requirements of *dolus*. Both papers are original and constitute real contributions to the solution of the much-debated problem. They need, however, careful check-

[16] Cf. *Seminar* VII (1949) 91.

ing, which again cannot be undertaken here; especially, Visky's interpretation of the sources is not always convincing, causing the author to assume a greater amount of technical distinctions than had been achieved by preclassical Roman jurisprudence.

A concept which so far has escaped the attention of Romanists is studied by M. Bartošek, *La "spes" en droit romain* (I 19–64). Bartošek's attempt merits serious consideration, although the author does seem to overrate the doctrinal import of his category. A contribution to the question of non-legal—in this case, medical—information of Roman legal writers and authors of imperial enactments is E. Renier's paper, *Observations sur la terminologie de l'aliénation mentale* (IV 429–55).

After the publication of the great works of Ferrini and Mommsen, Roman criminal law for many years remained a stepchild of modern Romanistics and has only in comparatively recent times moved back into the limelight. Archi, in his paper already mentioned, one of the most impressive in the collection, inquires into the reasons for these ups and downs of scholarly attention and justifies the new interest by pointing out that the role played by classical jurists in shaping the criminal law was more extensive and of greater doctrinal importance than is commonly assumed. A special problem of criminal law is treated by E. Volterra, *Processi penali contro i defunti in diritto romano* (II 485–500).

The current quest for a more exact determination of the phases passed through and the manipulations suffered by classical writings in postclassical times prior to Justinian is represented by F. Wieacker's discussion of *Doppelexemplare der Institutionen Florentins, Marcians und Ulpians* (II 577–607). The article, important primarily as a specimen and further development of new methods, establishes the fact that the respective compilers of Justinian's Digest and Institutes worked independently of each other, each group exploiting its own manuscripts of the works named in the title; consequently, any spurious elements found in excerpts of these works and common to both compilations must belong to earlier postclassical editors or compilers—the latter, if it is correct that Ulpian's *Institutiones* were concocted in postclassical times. Based on this main result of his study, the author offers several interesting exegeses, although some of his conclusions as to detail may be doubtful.

The problem of the formal foundations of law in the *Bas-Empire* is tackled by P. de Francisci (*Per la storia dell'editto perpetuo nel*

periodo postclassico; IV 319–60), who shows that the Edict remained in force as an imperial law throughout the late period. Minor questions arising from postclassical and Justinian legislation are the topics of L. Caes, *La destinée de la Nov. Maj. 6 d'après la formule de publication de la Nov. Sev. 1* (III 223-27), and of S. Di Marzo, *Sulla Novella 158 di Giustiniano* (I 243–46). F. Ebrard's interesting study: *Quelques allusions faites à leurs prédésesseurs par les compilateurs de l'empereur Justinien* (I 247–58) is a continuation of the author's earlier investigation into Justinian's original plan of codification and its subsequent modification.[17]

In *Justinian's prohibition of commentaries to the Digest* (IV 383–415), F. Pringsheim undertakes a critical review of a new interpretation recently proposed by A. Berger for *c. Deo Auct.* 12 and *Tanta-Dedoken* 21.[18] Expressing, on the one hand, his consent to Berger's opposition to former views, the author, on the other, modifies his predecessor's construction of the ban: according to Pringsheim, the emperor, while in principle permitting only *indices* which had to follow closely the words of the source, and excluding the voicing of new opinions which might cause confusion, did allow a certain freedom in explaining the legal text.

A number of the contributions listed deal with postclassical legal developments and with transformations of classical doctrine in the law of Justinian. In addition, the *Mélanges* contains several articles dealing with tendencies springing from spiritual attitudes and practical usages of the late period and signifying the transition from ancient to medieval law. The effects of Christian teaching are discussed by J. Imbert, *Réflexions sur le christianisme et l'esclavage en droit romain* (I 445–76), and E. J. Jonkers, *Quelques remarques sur les Pères de l'Eglise, les Conciles et les Constitutions des empereurs chrétiens, en leurs rapports réciproques, comme sources pour l'histoire du Bas-Empire* (I 493–509). More important, from the standpoint of legal history, are three papers concerning the survival of, and alterations undergone by, Roman legal principles in western lands during the early Middle Ages, a subject brought into the foreground

[17] "Die Entstehung des Corpus Iuris nach den acht Einführungsgesetzen des Kaisers Justinian" in *Schweizer Beitr. zur Allg. Geschichte* V (1947) 28ff. Cf. Kaser, *Z. Sav. St.* LXVII (1950) 568ff., and the objections by Pringsheim, *Mél. De Visscher* IV 393ff.

[18] *Quart. Bull. Pol. Inst. of Arts and Sci. in Amer.* III (1945) 656ff., *Bull. Ist. Dir. Rom., Suppl. Post Bellum* (1948) 124ff.

by E. Levy's recent *West Roman Vulgar Law* (Philadelphia, 1951). P. Vaccari, *Esperienze storiche sulle vicende del diritto romano nell'alto medio evo—la "donatio propter nuptias"* (II 360–72), shows the transformation of this institution in Italy and southern France, in consequence of its assimilation to the *dos* by western imperial legislation. P. Merêa, *Le mariage "sine consensu parentum" dans le droit romain vulgaire occidental* (IV 203–17), dwells on discrepancies between the official law and actual practice. J. F. Lemarignier, *Les actes de droit privé de Saint-Bertin au moyen âge: Survivance et déclin du droit romain dans la pratique franque* (IV 35–72), analyzes the documents transcribed in a chronicle of the Belgian monastery of Saint-Bertin, written by the monk Folcuin about 960. The clear result is that the forms of Roman vulgar law which appear in the instruments of the Merovingian period were in Carolingian times replaced by new modes of establishing interests in land. To explain this phenomenon, the author advances the hypothesis that the rise of great domains in the northern regions made the old modes of sale, *traditio,* and *donatio,* with a reserved usufruct, impracticable; in the South—represented chiefly by the documents of Cluny—the land was still held by small free owners and the traditional types of transaction remained in use.

With this, we have reached the group of articles dealing with questions of the reception and survival of Roman law in medieval and modern times. I have to confine myself to an enumeration of titles: R. Feenstra, *Inst. 2.1.41 et les origines de la "revendication" du vendeur non payé* (III 455–65), a recapitulation of the results, as regards the reception, of the author's book *Reclame en Revindicatie;*[19] J. Gilissen, *L'apparition des renonciations aux exceptions de droit romain dans le droit flamand au XIII^e siècle* (III 513–50); L. T. Maes, *La réception du droit romain dans le droit pénal malinois* (IV 111–26); E. M. Meijers, *Het zogenaamde "jus ad rem"* (IV 183–202). Of a more general character is J. Iglesias, *Del derecho romano al derecho moderno* (I 439–43). Ancient and medieval institutions of Germanic origin are treated by G. Lepointe, *Réflexions sur le texte de Tacite: "De la Germanie", XVIII* (II 83–89), and by P. Petot, *Les meubles des époux au moyen âge d'après les coutumes françaises* (II 213–30), and a question of Canon law attracted F. L. Ganshof, *Note sur l'élection des évêques*

[19] *Proefschrift* (Haarlem, 1949).

dans l'Empire romain au IV^e^ et pendant la première moitié du V^e^ siècle (III 467–98).

Eastern, i.e., Byzantine, modern Greek, and Islamic legal history is represented by the following: H. J. Scheltema, *Une pétition à l'empereur Alexis Comnène de l'an 1085* (IV 457–63); A. Dain, *Le second appendice de la "Synopsis Basilicorum"* (III 303–17); N. J. Pantazopoulos, *Aspect général de l'évolution historique du droit grec* (IV 245–79);[20] A. Abel, *La convention de Nedjran et le développement du "droit des gens" dans l'Islam classique* (I 1–17); R. Brunschvig, *Théorie générale de la capacité chez les Hanafites médiévaux* (I 157–72).

Addresses delivered in honor of F. De Visscher on September 27, 1949, and his reply are printed at the end of vol. IV. A good picture of Professor De Visscher and a bibliography of his writings are attached to vol. I. An index of sources would have rendered easier the use of the rich collection.

HANS JULIUS WOLFF

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Grundzüge der deutschen Rechtsgeschichte von Claudius Freiherrn von Schwerin, Vierte Auflage nach dem Tode des Verfassers besorgt von Hans Thieme: Berlin und München, Duncker & Humblot, 1950. xvi, 389 pp.

This new edition of a renowned work deserves to be brought to the attention of the readers of this annual, for the book is very useful for legal historians of all branches. It continues the tradition of Brunner and von Schwerin. Professor Thieme, a leading scholar in the history of German law, is especially fitted to this task.

The work embraces the entire history of German law, from the Germanic period through the Frankish epoch and the Middle Ages down to the present times. The history of the law is presented in connection with the evolution of the general culture as well as with the political and economic conditions. The recent literature is supplemented carefully. An exact index facilitates the use of the book.

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[20] The article is a résumé of the author's book *Ἀπὸ τῆς "λογίας" παραδόσεως εἰς τὸν Ἀστικὸν Κώδικα* (Athens, 1947), on which see F. F. Russell in *Seminar* VI (1948) 82ff.

The editors of SEMINAR have received the following communication:

An English translation of Professor Del Vecchio's book, *La Giustizia,* of which the article on "The Basis of Penal Justice" in vol. VIII of SEMINAR forms one chapter, will be published under the title, *Justice: An Historical and Philosophical Essay,* by the Edinburgh University Press, Edinburgh, Scotland, in 1952.

THE RICCOBONO SEMINAR OF ROMAN LAW IN AMERICA

ACADEMIC YEAR 1950-1951

Concilium:

Adolf Berger, J.U.D., Professor at the École libre des Hautes Etudes, New York, *Magister.*

William H. Roberts, Assistant Professor of International Relations, The Catholic University of America, *Scriba.*

Brendan F. Brown, D.Phil. (Oxon), LL.M., J.U.D., Dean, School of Law, The Catholic University of America, *ex officio.*

Rev. Felix A. Wilches, O.F.M., J.U.D., Lecturer in Roman Law, The Catholic University of America, *ex officio.*

Roscoe J. C. Dorsey, LL.M., D.C.L., former Professor at the Washington College of Law.

Stephan Kuttner, J.U.D., Professor of the History of Canon Law, The Catholic University of America.

Participating Seminars (Discussions on select readings):

November 30, 1950: Chapter VII, on the comparative approach to case law, from *Comparative Law* (Cambridge, 1946), by H. C. Gutteridge. Discussion leaders: Dr. Roberts and Mr. Karl K. Spriggs, LL.B.

February 15, 1951: "A Theory of Social Interests," by R. Pound, from *Readings in Jurisprudence* (Indianapolis, 1938), ed. J. Hall. Discussion leader: Dr. Franklin F. Russell.

Papers read at other Meetings:

October 27, 1950: Dr. Augustín Diaz Bialet, Professor of Roman Law, University of Cordoba, Argentine: "Roman Law and Jus naturale" (cf. SEMINAR VIII [1950] 92).

December 19, 1950: Dr. William H. Roberts: "The Corporation in Comparative Law."

March 8, 1951: Dr. Brendan F. Brown: "Genocide and the Jus gentium."

April 27, 1951: Dr. Paul M. Craig, Member of the Bar, D. C.: "Structural Differences between Common and Civil Law."

May 15, 1951: Dr. Adolf Berger (Magisterial Address): "In dubiis benigniora."

Concilium elected for the Academic Year 1951-1952:

Franklin F. Russell, M.A., B.C.L. (Oxon), J.D., Member of the Bar of the District of Columbia, *Magister.*

William H. Roberts, *Scriba.*

Brendan F. Brown, *ex officio.*

N.N., Professor of Roman Law, The Catholic University of America, *ex officio.*

Adolf Berger.

Stephan Kuttner.

THE INHERITANCE OF THE COMMON LAW

Under this title there has been published by Stevens and Sons, Ltd., London (1950) the four lectures delivered by Richard O'Sullivan, K.C., as the second series of the Hamlyn Lectures. The book contains four lectures: "The Concept of Man in the Common Law", "The Family", "The Political Community", and "Law and Conscience". The Hamlyn Lectures are given in virtue of a trust established by the will of Miss Emma Warburton to spread the knowledge of Jurisprudence and Ethnology. The purpose is to inform the people of the United Kingdom of the privileges which they enjoy through law and custom and to stimulate a recognition of the responsibilities and obligations attaching to them.

Mr. O'Sullivan is appreciatively remembered for his participation in the third annual Natural Law Institute held at the University of Notre Dame, December 9 and 10, 1949. On that occasion he read a paper on the subject, "The Natural Law and the Common Law". At the same Institute, Dr. Stephan Kuttner read a paper on "The Natural Law and Canon Law". Two other papers read on the same occasion were: "The Natural Law and Constitutional Law" by Prof. Edward S. Corwin of Princeton University, and "Natural Law and International Law", by Brig. Gen. Carlos P. Romulo.